

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7308

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

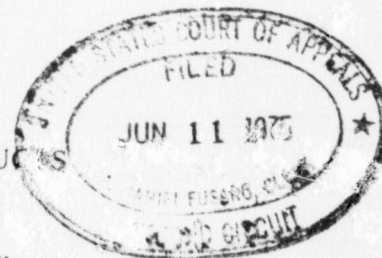
L. BATLIN & SON, INC.,

Plaintiff-Appellee,

vs.

JEFFREY SNYDER, d/b/a J.S.N.Y. and ETNA PRODUCTS
CO., INC.,

Defendants-Appellants.



JOINT APPENDIX

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Docket Entries

A-1

DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	FILING DATE DAY	FILING DATE YEAR	J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
208-1	75	2036	04	29	75	2	820	1					0835		75	2036

PLAINTIFFS

L. BATLIN & SON, INC.

DEFENDANTS METZNER, J.

SNYDER, JEFFREY, d/b/a JSNY
ETNA PRODUCTS CO., INC.
5-16-75 UNITED STATES CUSTOMS SERVICE

5/27

copyright infringement
28 USC 2201

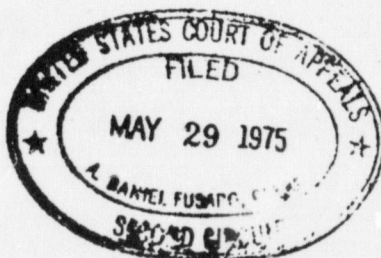
CAUSE

sls

Jacobs and Jacobs
521 5th Ave., NYC 10017
687-1636

ATTORNEYS

Arthur J. Fales, Herbert L. Loffen
260 Madison Ave., NYC 10017
1-855-8970 with phone



A

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APR 29 1975

50852

STANDARD CARDS

CARD DATE MAILED

JS5

X

JS6

Docket Entries

A-2

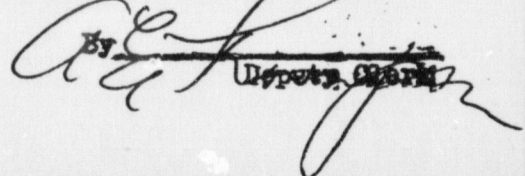
75 Civ. 2036 L. BATLIN & SON VS JEFFREY SNYDER ET AL

METZNER, J.

DATE	NR.	PROCEEDINGS
04-29-75	-1-	Filed complaint and issued summons.
05-02-75	-2-	Filed pltf's affdvt. and order to show cause for prel. injunction. T.R.O. that defts are temp. restrained until the hearing and determination of pltf's motion Ordered that pltf. file with the Clerk of this Court a security bond in the sum of \$5,000. - Order will expire 10 days after entry thereof, unless ext. by this court. Service by 5-2-75 at 11 AM. -- OSC ret. 5-6-75 -- Metzner, J.
05-06-75	-2-	Filed true copy of TRO and OSC filed on 5-2-75 with Marshals return of service served: Atty. Gen'l, Dept. of Justice, Wash., DC - cert. mail #285019 - 5-2-75 US Customs Service by Mr. Minsky on 5-2-75
05-06-75	-3-	Filed Undertaking on T.R.O. and Prel. Inj. - \$5,000.00 - Peerless Ins. Co.
05-12-75	-4-	Filed defendants memorandum in opposition to pltf's motion for prel. inj.
05-12-75	-5-	Filed plaintiff's reply memorandum in support of its motion for prel. inj.
05-12-75	-6-	Filed OPINION #42396...The motion by the United States Customs Service to dismiss the complaint is granted. Motion granted. Settle order. -- Metzner, J. m/n
05-16-75	-7-	Filed consent order that deft. Snyder and Etna Products Co. are enjoined as indicated pending determination of this action. Ordered that plaintiff give security in the sum of \$5,000.00. Ordered that the motion of the US Customs Service to dismiss the complaint as to it is granted. -- Metzner, J. m/n
05-09-75	-8-	Filed summons and Marshals returns - served: Jeffrey Snyder by Frank Grover on 5-5-75 Etna Products Co., Inc. by Frank Grover on 5-5-75 US Customs Service by Reg. Counsel on 5-5-75
05-07-75	-9-	Filed summons and Marshals return - served The Attorney General, Dept. of Justice Wash., DC - cert. mail #162431 - 5-5-75
05-27-75	-10-	Filed defts' affdvt. and notice of motion for an order suspending the injunction heretofore entered against them, pending the hearing and determining of defts' appeal to the Court of Appeals from the order of this Court entered 05-16-75. ret. June 6, 1975 Rm 2201
05-27-75	-11-	Filed defts. notice of appeal to the USCA from the order granting a preliminary injunction against enforcement of their copyright entered on May 16, 1975. (copies mailed)
May 29-75		Filed transcript of proceedings dated May 6-75.

A TRUE COPY

RAYMOND F. BURCHARD, Clerk

By  Deputy Clerk

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK----- x
L. BATLIN & SON, INC., :

Plaintiff, :

v. :

CIVIL ACTION NO. :

JEFFREY SNYDER, d.b.a. JSNY, :
ETNA PRODUCTS CO., INC., and :
UNITED STATES CUSTOMS SERVICE, :Defendants. :
----- xC O M P L A I N T

L. BATLIN & SON, INC., plaintiff above named, by its attorneys, hereby files its Complaint against defendants and alleges as follows:

1. Plaintiff is a corporation duly organized under the laws of the State of New York and has its office and principal place of business at 49 West 23rd Street, New York, N. Y.

2. Upon information and belief, defendant JEFFREY SNYDER is a citizen of the United States of America and of the State of New York, and does business in the County of New York under the name and style "J.S.N.Y." at 53 West 23rd Street, New York, N. Y.

3. Upon information and belief, defendant ETNA PRODUCTS CO., INC., is a corporation of the State of New York, having its principal place of business at 53 West 23rd Street, New York, N. Y.

4. The United States Customs Service is made a party defendant by virtue of the publication of an Exclusion Order, dated April 1, 1975, restricting importation on Uncle Sam Savings Banks.

COUNT I

5. This is an action under the Declaratory Judgment Act (Title 28 USC Section 2201, 2201) and jurisdiction of this Court is predicated upon Title 28, USC, Section 1338, relating to Copyrights and related claims of unfair competition.

6. An actual controversy now exists between the parties hereto with respect to the invalidity of a copyright allegedly owned by defendant SNYDER and with respect to the infringement of said copyright by plaintiff. Attached hereto as Exhibits 1 and 2 is an exchange of correspondence between the attorneys for the parties hereto evidencing said controversy.

7. Plaintiff is engaged in the design and sale of such goods as toys, novelty items, housewares, porcelain, china and glass, and said goods are advertised and sold throughout all of the United States; by reason of the plaintiff's special knowledge and skill acquired from many years spent in the design and sale of its goods, plaintiff has acquired and now possesses an extremely enviable reputation in the trade and in the minds of the general public for the excellence, quality and appearance of its goods; because of the excellence of the plaintiff's goods and its favorable reception by the trade and purchasing public, plaintiff is now possessed of a very valuable good will in the trade and among its customers and the purchasing public, which good will is one of the most important and valuable assets of the plaintiff.

8. Upon information and belief, defendant SNYDER obtained a registration of a claim to copyright, No. Gp95881 on January 22, 1975 for a work entitled "UNCLE SAM BANK."

9. The Copyright Registration No. Gp95881, allegedly owned by defendant SNYDER, is invalid, void, and of no force and effect because the work purported to be covered by said registration was not originally created, designed or conceived by said defendant and said defendant was not the author thereof, and further because said defendant failed to comply with the notice provisions of the Copyright Act.

10. The work purported to be covered by Copyright Registration No. Gp95881 has long since been in the public domain, at least since June 8, 1886, when one Charles G. Shepard and one Peter Adams secured Design Patent No. 16,728 on a Toy Savings Bank having a

. . . four-sided base or pedestal, having its front side ornamented with the figure of an eagle, represented as carrying a ribbon. . . the figure of a man standing on the base or pedestal, with his right hand held out . . . a satchel or traveling-bag resting on the base by the side of the figure and underneath the outstretched right hand of the same. The left hand of the figure carries an umbrella.

A copy of said Design Patent is annexed hereto as Exhibit 3.

11. The work purported to be covered by Copyright Registration No. Gp95881 has been sold in the United States since 1886, and may be seen in various museums and is illustrated in many reference books, one such publication being Old Mechanical Banks by Ina Hayward Bellows, copyrighted in 1940, page 117.

A copy of this page is annexed hereto as Exhibit 4.

12. Defendant SNYDER made application to register a claim to copyright in violation of the Copyright Law, to wit, Title 17, United States Code, Section 8 in that he knowingly endeavored to protect a work which was already in the public domain and which was published prior to July 1, 1909, to the damage of the plaintiff.

COUNT II

13. This is an action for unfair competition and jurisdiction of this Court is predicated upon Title 28, United States Code, Section 1338 (b).

14. Defendant SNYDER secured Copyright Registration No. Gp95881 with full knowledge that the work sought to be protected was in the public domain and that he was not the author thereof, and together with defendant, ETNA PRODUCTS CO., INC. knowingly and wilfully set out upon a scheme to exclude all others from the manufacture, importation, and sale of the work known as UNCLE SAM MECHANICAL SAVINGS BANK.

15. Said defendants have wrongfully, illegally, maliciously and wilfully asserted and claimed, and still wrongfully, illegally, maliciously and wilfully assert and claim, that plaintiff's work is and continues to be an infringement of said alleged copyright; the plaintiff contends and asserts that alleged rights of said defendants under said alleged copyright are not violated by the plaintiff, and said defendants have no such rights because the plaintiff does not infringe upon the said alleged copyright, and further, because said alleged copyright is invalid, void and of no effect in law and in equity.

16. Said defendants have no rights or privileges to prevent the publication, promotion and/or sale of plaintiff's work and said defendants have no right to assert any exclusive privileges as against the plaintiff and the customers of the plaintiff, because said alleged copyright is not infringed by the plaintiff or its customers, and is further invalid, void, not based on an original work protectable under the Copyright

laws of the United States and of no force and effect, as a result of which the plaintiff has been damaged.

17. Said defendants, by their foregoing acts, by threatened institution of action and by recording said copyright with the United States Custom Service under Title 19 Code of Federal Regulations, Section 133.32, have prevented and interfered with and are preventing and interfering, knowingly and wilfully, with plaintiff's business and sales, have impaired the reputation, business and good will of the plaintiff, have attempted to stifle and suppress and actually have stifled and suppressed the plaintiff's business, and unfairly competed in the sale and promotion of their work, and have been engaged in unfair trade practices and unfair competition against the plaintiff, all to the great damage of the plaintiff.

18. Plaintiff has invested large sums of money in perfecting and preparing its work and has an excellent reputation and good will throughout the trade.

COUNT III

19. This is an action for restraint of trade and jurisdiction of this Court is predicated upon Title 15, United States Code, Sections 4 and 15, and Title 28 United States Code, Section 1337.

20. Defendants SNYDER and ETNA PRODUCTS CO., INC., have knowingly and wilfully conspired together to illegally monopolize that part of trade and commerce among the several states involving sales of the work in the form of UNCLE SAM MECHANICAL SAVINGS BANK by fraudulently and in bad faith obtaining and maintaining Copyright Registration No. Gp95881,

well-knowing that defendant SNYDER had no basis for obtaining said copyright.

21. That in the course of said unlawful violation of the Anti-Trust Laws, said defendants with willful intent to monopolize:

a) Threatened action for copyright infringement with full knowledge that said alleged copyright is invalid because the work has not been originally created, designed or conceived by defendant SNYDER, that said defendant is not the author of said work and that said work is not proper subject of copyright.

b) Threatened action against the plaintiff for copyright infringement with full knowledge that said alleged copyright is invalid because it has not complied with the form of copyright notice required or prescribed by the Copyright Laws of the United States (Sections 10 and 19 of United States Code) and the Rules and Regulations of the Copyright Office, 37 C.F.R. 202.2 (a)(2);(b)(8)(11).

c) Enforced the said alleged copyright as a tool to fix the price of said BANKS and to aid in the elimination of defendant as a competitor by recording said copyright with the United States Customs Service under the provisions of Title 19, Code of Federal Regulations, Section 133.32.

d) Enlarged any monopoly granted under the Copyright Laws of the United States by attempting to bring defendant's original work within the scope of said monopoly with knowledge that there is no infringement in fact.

22. By virtue of the recordation of said copyright with the United States Customs Service, an order of exclusion has been

promulgated by said Service which prohibits the importation of any UNCLE SAM MECHANICAL SAVINGS BANKS, and plaintiff's goods embodying plaintiff's version of the said BANK have been denied entry into the United States, and those goods which have entered are under a NOTICE OF RE-DELIVERY, dated April 15, 1975, issued by the said Service. Plaintiff is suffering immediate and irreparable damage because of said actions by said Service.

23. Plaintiff has been, prior to the institution of the present action, and still is, in competition with said defendants, and the aforesaid illegal, monopolistic and restraint of trade activities of said defendants has damaged said plaintiff in its business and its said damages are mounting daily.

24. Upon information and belief, said defendants have taken the same action with respect to other works in the public domain and specifically other mechanical banks, and if not restrained, will attempt to misuse any copyrights obtained, as they have misused Copyright Registration No. Gp95881, in furtherance of their conspiracy to monopolize and restrain trade in works in the public domain.

25. With respect to the causes of action set forth in the foregoing COUNTS I through III, plaintiff has no adequate remedy at law.

W H E R E F O R E,

plaintiff demands judgment:

1. That this Court declare and decree that Copyright Registration No. Gp95881 is void, invalid, has no legal or equitable effect.

2. That the defendants SNYDER and ETNA PRODUCTS CO., INC., and each of them, their agents, servants, employees and attorneys and all persons in active concert with them be enjoined during the pendency of this action and permanently thereafter from further asserting, contending, claiming or alleging that the said Copyright Registration is valid and infringed or from enforcing any alleged rights in and to the said Copyright Registration, and that they be compelled to cancel the recordation thereof with the United States Customs Service.

3. That the United States Customs Service be enjoined during the pendency of this action and permanently thereafter from enforcing the said Copyright Registration in any manner including the issuance of Exclusion Orders and Notices of Re-Delivery based thereon, and from refusing entry into the United States to any UNCLE SAM MECHANICAL SAVINGS BANK that otherwise, if not for said recordation, would be permitted entry.

4. That this Court grant preliminary and permanent injunctions, enjoining and restraining the defendants SNYDER and ETNA PRODUCTS CO., INC., their agents, attorneys, employees, associates, and all other persons in active concert or participation with said defendants from interfering with plaintiff's promotion, sale, advertising and exploitation of its UNCLE SAM MECHANICAL BANK, and from threatening plaintiff's trade, customers, advertising sources and suppliers by reason thereof.

5. That the defendants SNYDER and ETNA PRODUCTS CO., INC. be required to pay to plaintiff such damages as plaintiff has

sustained in consequence of said defendants' unfair trade practices and unfair competition, conspiracy to monopolize and restrain trade and monopolization and restraint of trade, and to account for all gains, profits and advantages derived by the defendants by said unfair trade practices and competition, and conspiracy to monopolize and restrain trade and monopolization and restraint of trade.

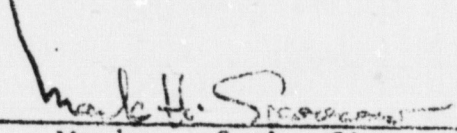
6. That the plaintiff recover three-fold the damages by it sustained as a result of defendants' violation of Title 15, United States Code Section 1.

7. That plaintiff recover its costs in this action, including reasonable counsel fees.

8. That this Court grant plaintiff such other and further relief as justice may require.

JACOBS & JACOBS, P. C.

By


Member of the firm

521 Fifth Avenue
New York, N. Y.

MU 7 1636

Attorneys for Plaintiff

OF COUNSEL:

MARK H. SPARROW

Complaint
OSTROLENK, FABER, GERB & SOFFEN

A-12

SAMUEL OSTROLENK
1898-1968

SIDNEY G. FABER
BERNARD GERB
MARVIN C. SOFFEN
SAMUEL H. WEINER
JEROME M. BERLINER
LOUIS WEINSTEIN
ROBERT C. FABER
EDWARD A. MEILMAN

ATTORNEYS AT LAW
260 MADISON AVENUE
NEW YORK, N.Y. 10016

PATENTS
TRADE MARKS
RELATED CAUSES

TELEPHONE
(212) 685-8470

CABLE
OSTROFABER NEW YORK

TELEX
23 6925

February 5, 1975

L. Batlin & Son, Inc.
49 West 23rd Street
New York, New York 10010

Re: Copyright Registration No. Gp 95881
Uncle Sam Mechanical Bank
(OFGS File M 7.0-221)

Gentlemen:

We represent Jeffrey Snyder, the owner of the above noted registered copyright on the Uncle Sam Mechanical Bank. He has authorized Etna Products Co., Inc. of New York, New York to market the copyrighted bank.

We have been informed that you are offering for sale and selling and promising to deliver mechanical banks which are infringements of our client's copyrighted Uncle Sam Mechanical Bank.

You are requested to immediately discontinue soliciting orders for the infringing bank, to cancel all orders already taken, to halt any deliveries, to destroy all samples and copies of the infringing bank and to account to Etna Products Co. and to Mr. Snyder for any profits realized from your infringement.

Please be further advised that a copyright infringement action has been commenced against E. Mishan & Sons for infringement of the same copyright. If your infringement persists, suit will be brought against you.

You are requested to immediately notify me of your compliance with the demands contained herein.

Very truly yours,

OSTROLENK, FABER, GERB & SOFFEN

Robert C. Faber
Robert C. Faber

RCF/ec

VIA CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

ALBERT L. JACOBS
ALBERT L. JACOBS, JR.
JESSE D. REINGOLD
MARK H. SPARROW

Complaint
JACOBS & JACOBS, P. C.

521 FIFTH AVENUE
NEW YORK, NEW YORK 10017

(212) MURRAY HILL 7-1636

CABLE ADDRESS
"PATRADELAW" NEW YORK
TELEX 421751

A-13

PATENTS
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2316 SOUTH EADS ST.
ARLINGTON, VA. 22202
(703) 979-4874

PETER M. BOESEN (AGENT)

ASSOCIATE COUNSEL
NATHAN M. BRISKIN (1958-1971)

February 10, 1975

Robert C. Faber, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, N. Y. 10016

Re: Uncle Sam Mechanical Bank

Dear Mr. Faber:

Our client, L. Batlin & Son, Inc., has turned over to us for reply your letter of February 5, 1975, concerning your allegation of copyright infringement on a plastic mechanical bank bearing the figure of Uncle Sam. Our client has supplied us with a copy of its bank and a copy of your client's bank. It is inconceivable that you would be a party to an obvious attempt on the part of your client to restrain the trade in a device which is in the public domain and has been for some one hundred years. I happen to have personal knowledge of the original castiron banks from which our client took its copy, which dates back to somewhere between 1875 and 1886. Our client's bank is faithful reproduction thereof, as is your client's bank. The fact that a copyright registration was obtained raises a grave question of fraud with concomitant anti-trust violations. For your information, I am enclosing herewith a copy of an illustration from the book, Old Mechanical Banks by Ina Hayward Bellows. This book was written in 1940 and is a recognized work on old mechanical banks. Photographs of this bank are found in almost all the standard reference works on old mechanical banks. We might also add that we are aware of other violations committed by your client in his attempt to claim copyright protection.

By this letter, we are serving notice upon you and your client that, should your client attempt in any way to interfere with our client's manufacture and sale of its above described mechanical bank, including but not limited to notification of customers of alleged infringement, we shall take every action at our disposal to seek redress of all damages which may be caused by such illegal interference with our client's business.

Very truly yours,
JACOBS & JACOBS, P. C.

MHS/eh
enc.

cc: L. Batlin & Son, Inc.

By Mark H. Sparrow

84-11

D34-11.R

92

DESIGN.

SHEPARD & P. ADAMS.

SAVINGS BANK.

No. 16,728.

Patented June 8, 1886.



Theodore L. Popp
Chas. Buchheit

Witnesses.

Chas. G. Shepard,
Peter Adams

Inventors.

By Wilhelm Bonner

Attorneys.

UNITED STATES PATENT OFFICE.

CHARLES G. SHEPARD AND PETER ADAMS, OF BUFFALO, NEW YORK; SAID
ADAMS ASSIGNOR TO WALTER J. SHEPARD, OF SAME PLACE.

DESIGN FOR A TOY SAVINGS-BANK.

SPECIFICATION forming part of Design No. 16,729, dated June 8, 1886.

Application filed May 1, 1886. Serial No. 200,883. Term of patent 7 years.

To all whom it may concern:

Be it known that we, CHARLES G. SHEPARD and PETER ADAMS, citizens of the United States, residing at Buffalo, in the county of Erie and State of New York, have invented and produced a new and original Design for Toy Savings-Banks, of which the following is a specification.

This design relates to the general configuration of an ornamental toy savings bank; and our new design is clearly represented in the accompanying drawing, which forms part of this specification.

A represents the four-sided base or pedestal, having its front side ornamented with the figure of an eagle; represented as carrying a ribbon.

B represents the figure of a man standing on the base or pedestal A, with his right hand held out.

C represents a satchel or traveling bag resting on the base A by the side of the figure B and underneath the outstretched right hand of the same. The left hand of the figure carries an umbrella.

We claim—

The design for a toy savings-bank herein shown and described, the same consisting of a base or pedestal, the figure of a man standing on the same, and a satchel resting on the base by the side of the figure, substantially as set forth.

Witness our hands this 20th day of April, 1886.

CHAS. G. SHEPARD.
PETER ADAMS.

Witnesses:

JNO. J. BONNER,
OSCAR SCHAUR.

OLD MECHANICAL BANKS

117



"The Uncle Sam" Bank: This is a popular one, but it's not as rare as some of the less colorful. A coin is placed in the outstretched hand, the lever pressed—he slips the coin into his carpet-bag then nods his head "thank you" with his goatee bobbing up and down. A Class "B".

Page 3

Certificate

Registration of a Claim to Copyright

in a work of art or a model or design for a work of art

FORM G

REGISTRATION NO.

GP 95881

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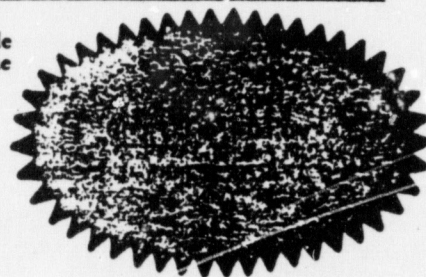
CLASS

G

This Is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Barbara Ringer

Register of Copyrights
United States of America



1. Copyright Claimant(s) and Address(es):

Name Jeffrey Snyder, conducting business under the name J.S.A.N.Y.Address 53 West 23rd Street, New York, New York 10011

Name _____

Address _____

2. Title: UNCLE SAM BANK
(Title of the work)3. Nature of Work: Sculpture
(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) _____ ☐ Weight (in pounds) _____
☐ Size (give dimensions) _____ ☐ Fragility (give details) _____

5. Author (i.e., Artist):

Name Jeffrey Snyder Citizenship U.S.A.
(Legal name followed by pseudonym if latter appears on the copies) (Name of country)Domiciled in U.S.A. Yes X No _____ Address 53 West 23rd Street, New York, N.Y. 10011

6. (a) Date of Publication:

October 15 1974
(Month) (Day) (Year)

(b) Place of Publication:

U.S.A.

(Name of country)

(c) Manufacture Outside United States by Lithographic or Photoengraving Process:

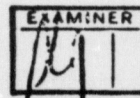
(Name of country)

7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____

Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____

Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version: _____



Complete all applicable spaces on next page

8. Deposit account:

Copyright Reg. No. Gp 95881

A-18

9. Send correspondence to:

Name Ostrolenk Faber Gerb & Soffen Address 260 Madison Avenue, New York, N.Y. 10017

10. Send certificate to:

(Type or
print Name
name and
address)
Address

OSTROLENK, FABER, GERB & SOFFEN

260 Madison Avenue

(Number and street)

New York

(City)

New York

(State)

10016

(ZIP code)

Information concerning copyright in works of art

When to Use Form G. Form G is appropriate for unpublished and published works of art, and models and designs for works of art.

What Is a "Work of Art"? This category (Class G) includes works of the fine arts, and works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned. Common examples of works of art are

paintings, drawings, sculpture, ceramics, artistic jewelry, original designs applied to textiles, and the like.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

Unpublished works of art

How to Register a Claim. To obtain copyright registration, mail to the Register of Copyrights, Library of Congress, Washington, D.C. 20559, a photograph or other identifying reproduction of the work, an application on Form G, properly completed and signed, and a fee of \$6. Deposits are not returned, so do not send your only copy.

Procedure to Follow if Work Is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published edition must contain a copyright notice in the required form and position.

Published works of art

What Is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. Unrestricted public exhibition of a work of art may also constitute publication.

How to Secure Copyright in a Published Work of Art:

1. Produce copies with copyright notice.
2. Publish the work.
3. Register the copyright claim, following the instructions on page 1 of this form.

The Copyright Notice. In order to secure and maintain copyright protection in a published work, it is essential that all copies published in the United States contain the statutory copyright notice. The notice should ordinarily consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner. The year date of publication may be included in the notice, but normally it is not required.

Alternative Form of Notice. As an alternative, the notice for works of art may consist of the symbol ©, accompanied by the initials, monogram, or mark of the copyright owner, provided the owner's name appears on some accessible part of the copies.

Universal Copyright Convention Notice. Use of the symbol © with the name of the copyright owner and the year date of publication may result in securing copyright in countries which are parties to the Universal Copyright Convention, which protection might not be obtained by use of either of the alternative forms of notice. Example: © John Doe 1973.

Optional Deposit. For certain published works, it may be impractical to deposit actual copies because of their size, weight, fragility, or monetary value. In such cases the Register of Copyrights may permit the deposit of photographs or other reproductions instead of the actual copies, under conditions specified in the Copyright Office Regulations. If the optional form of deposit is used, it will be necessary: (1) to fill out line 4, on pages 1 and 3, and (2) to deposit photographs or other identifying reproductions of the work. For more detailed information, write to the Copyright Office.

If you consider that first publication of your work took place by means of its unrestricted public exhibition with copyright notice, you may deposit photographs of the work.

NOTE: If copies are published without the required notice, the right to secure copyright is lost and cannot be restored.

FOR COPYRIGHT OFFICE USE ONLY		
Application received <u>1416 22 1975</u>	Two copies received <u>JAN 22 1975</u>	Photographs or reproductions received
One copy or reproduction received		
Fee received <u>143401 JAN 16 75</u>		

Temporary Restraining Order, Order to Show Cause
and Motion for Preliminary Injunction

A-19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

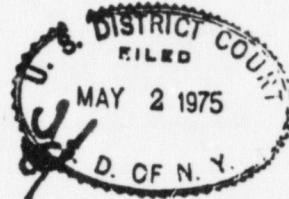
L. BATLIN & SON, INC.,

Plaintiff,

v.

JEFFREY SNYDER, d.b.a. JSNY,
ETNA PRODUCTS CO., INC., and
UNITED STATES CUSTOMS SERVICE,

Defendants.



CIVIL ACTION NO. 75 CIV. 2036 CM

U.S. DISTRICT COURT
S.D. OF N.Y.
MAY 2 11 17 AM '75

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE AND
MOTION FOR PRELIMINARY INJUNCTION

Upon the Complaint, the Affidavits of Herman Batlin and Mark H. Sparrow, and upon the Memorandum of Law, all annexed hereto, and it appearing to the Court that the defendants are committing acts or are about to commit acts which, unless restrained by Order of this Court, will result in immediate and irreparable injury, loss, or damage to the plaintiff before said defendants or their attorneys can be heard in opposition, it is:

ORDERED that the defendants, and each of them, appear before this Court in Room ²⁰⁵~~2201~~, United States Courthouse, Foley Square, New York, New York, on May 6, 1975, at 4 o'clock in the afternoon thereof, or as soon thereafter as counsel may be heard to show cause, if any there be, why a preliminary injunction ^{PURSUANT TO RULE 65 FRCP} should not be issued as prayed for in the Complaint on file herein; and it is further

ORDERED that the defendants, Jeffrey Snyder and Etna Products Co., Inc., shall upon being served with a copy of this order, be temporarily restrained, as shall their agents, servants,

Temporary Restraining Order, Order to Show Cause
and Motion for Preliminary Injunction A-20
employees, attorneys, and all persons in active concert and

participation with them, from asserting, contending, claiming,
or alleging that Copyright Registration No. GP95881 is valid and
infringed or from enforcing any rights in and to said copyright
registration, until the hearing and determination of plaintiff's
Motion for Preliminary Injunction. *AND IT IS FURTHER*

ORDERED that defendant, Jeffrey Snyder, upon being served
with a copy of this Order, cancel the recordation of Copyright
Registration No. GP95881 with the United States Customs Service
until the hearing and determination of the plaintiff's Motion
for Preliminary Injunction be held as above stated; and it is
further

ORDERED that defendant, United States Customs Service,
upon being served with a copy of this Order be temporarily
restrained from enforcing Copyright Registration No. GP⁹5881
in any manner, including the issuance of Exclusion Orders and
Notices of Redelivery based upon the recordation thereof, and
from refusing entry into the United States to any UNCLE SAM
MECHANICAL SAVINGS BANK that otherwise, if not for said
recordation, would be permitted entry, until the hearing of
plaintiff's Motion for Preliminary Injunction be held as afore-
stated; and it is further

ORDERED that plaintiff file with the Clerk of this Court a
security bond in the amount of \$ 5000, in a form approved by
the Court or the Clerk, for the payment of such costs and damages
as may be incurred by any defendant who is finally found to have

MAY 6 1975

Approved Bond Filed 5/6/75 and
Substituted for Clerk's Service was
holding in lieu of Bond

MAY 2 1975

received identification sheet in
amount of \$5000 as
stated same until replaced by a
amount bond - (20)

Temporary Restraining Order, Order to Show Cause
and Motion for Preliminary Injunction

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been wrongfully enjoined or restrained; and it is further

ORDERED that this order expire within ten (10) days after entry thereof, unless within the time so fixed by this order, for good cause shown, it is extended by this Court, or unless the defendants consent that the said order may be extended for a longer period; and it is further

ORDERED that personal service of this Order, together with a copy of the papers hereto attached, on or before the 2 day of May, 1975 at 11: A.M. be deemed sufficient service, and that service of answering papers on or before the 5 day of May, 1975 at 4: P.M. be deemed sufficient.

Dated: New York, New York
May 2, 1975

ISSUED 16: 45 P.M.

Charles W. Metzger
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
L. BATLIN & SON, INC.,

Plaintiff,

v.

CIVIL ACTION NO.
75 Civ. 2036JEFFREY SNYDER, d.b.a. JSNY,
ETNA PRODUCTS CO., INC., and
UNITED STATES CUSTOMS SERVICE,Defendants.
-----xAFFIDAVIT OF HERMAN BATLINSTATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

HERMAN BATLIN, being duly sworn, deposes and says that:

I am the President of L. Batlin & Son, Inc., the plaintiff hereinabove named; L. Batlin & Son, Inc. is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business at 49 West 23rd Street, New York, New York;

L. Batlin and Son, Inc. has been in business since 1929, and I have been President thereof since 1933. The corporation is engaged in the design, importing and sale of such goods as toys, novelty items, housewares, porcelain, china and glass, and said goods are advertised and sold throughout all of the United States. L. Batlin & Son, Inc. has acquired and now possesses a very valuable goodwill in the trade and among its customers because of the excellence of the plaintiff's goods and its prompt delivery of merchandise ordered;

L. Batlin & Son, Inc. has been selling various types of novelty savings banks for at least 20 years; early in 1974, we became aware that there were on the market cast iron replicas of antique mechanical banks which, upon information and belief, were made in the United States; subsequently, I was offered for sale cast iron mechanical banks made in Taiwan which were also replicas of the same antique mechanical banks, one of which was the bank known as the Uncle Sam Mechanical Bank;

On August 9, 1974, I placed my first order for a quantity of cast iron Uncle Sam Mechanical Banks. A copy of relevant portions of this order is attached hereto as Exhibit 1. On August 12, 1974, I received a sales memorandum acknowledging receipt of this order, and relevant portions of this sales memorandum are attached hereto as Exhibit 2. On October 3, 1974, a sample of this cast iron Uncle Sam Mechanical Bank was sent to me by my trading company and was received about a week later. Relevant portions of the invoice for said sample is attached hereto as Exhibit 3. On December 31, 1974, my order for the cast iron Uncle Sam Mechanical Banks was shipped from Taiwan, and relevant portions of the invoice for this shipment is attached hereto as Exhibit 4. A picture of the cast Iron Uncle Sam Mechanical Bank is attached hereto as Exhibit 5, and an actual sample thereof will be available to the Court at the hearing of the attached Motion;

In the latter part of 1974, I became aware of the Uncle Sam Mechanical Bank made of plastic which, in my opinion, was an almost identical copy of the bank made of cast iron which I was already selling. My trading company in Hongkong procured a

Affidavit of Herman Batlin A-24
manufacturer, and I placed an order for these plastic banks.

The first samples of the plastic bank were received in the beginning of January, 1975, and a copy of relevant portions of the invoice for the said samples is attached hereto as Exhibit 6. We began to take orders for the plastic banks using our cast iron banks as samples and indicating to customers that it would be made in plastic, and orders based on the plastic samples received from Hongkong were taken at the Housewares Show held in Chicago, January 10-15, 1975, and to date we have received orders for over 5,000 dozen of these plastic Uncle Sam Mechanical Banks;

In March, 1975, we received 360 dozen plastic banks from Hongkong, which were shipped out to our customers. In the beginning of April, 1975, we received 80 dozen plastic banks but were unable to ship the same since the United States Customs Service notified us that Jeffrey Snyder had recorded with them a copyright that covered the Uncle Sam Mechanical Bank. The Custom Service then advised us to return the 80 dozen banks to them; these are currently being held in our basement;

On February 5, 1975, we had received from the attorneys for Jeffrey Snyder and Etna Products Co., Inc. a letter indicating that Jeffrey Snyder had copyrighted the bank and demanding that we stop the sale thereof. I immediately took this letter to my attorney, Mr. Mark H. Sparrow, of Jacobs & Jacobs, P. C.; he advised me that his immediate opinion was that the plastic bank was uncopyrightable since he was personally aware of the antique cast iron Uncle Sam Mechanical Bank. However, he did some research on this, which culminated in his letter to the afore-

mentioned attorneys rejecting their allegations. Copies of these letters are attached to the Complaint filed in the above-entitled action;

At the present time there are 1104 dozen plastic Uncle Sam Mechanical Banks in storage, although 924 dozen were released by the Customs Service but are being held pending a Notice of Redelivery. The other 180 dozen are stored in bond, the Customs Service refusing entry thereof. There are currently on order over 2000 dozen plastic Uncle Sam Mechanical Banks which will begin arriving in about a week to 10 days. I have advised Hongkong to hold delivery of approximately 9000 dozen because of the action by the Customs Service;

In addition to the plastic Uncle Sam Mechanical Banks, the Customs Service is refusing entry to 450 of my cast iron banks by virtue of the recordation of the copyright. There are 300 more cast iron banks on the water which will be held up in the same manner;

✓
Because of the Exclusion Order as a result of the recordation of the copyright, we have already had an order cancelled by Howard Discount Center in Texarkana, Texas. If we cannot deliver goods within the next week or two, we will have orders cancelled by Howard Discount Center in Center, Texas, by Nyanza Mills in Woonsocket, Rhode Island, and by Fay's Drug Store in Liverpool, New York. We also have been advised by Benny's of Esmond, Rhode Island, by Kravitz & Rothbard of Baltimore, Maryland, by Gorin's of Boston, Mass. and by Heck's in Charleston, West Virginia, that if we cannot deliver in the very near future

Affidavit of Herman Batlin
they will cancel their orders;

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It is my opinion, based upon my long business experience, that substantial demand for the plastic Uncle Sam Mechanical Bank will not last past the end of this Bi-Centennial Year;

I have also been importing a cast iron bank in the form of an elephant. I have been advised that this elephant bank was available in plastic and have subsequently seen and placed an order for such bank. I have subsequently seen and secured a plastic elephant bank upon which is inscribed the same copyright notice as appears on the plastic Uncle Sam Mechanical Bank, and, because I am fearful of being stopped on the sale of the plastic replica of the antique bank, I have cancelled my order;

In view of my failure to be able to deliver the plastic Uncle Sam Mechanical Bank, because of the Exclusion Order, it is my belief that L. Batlin & Son, Inc. will suffer irreparable damage by virtue of loss of profits due to cancellation of orders on hand; by not being able to sell the said banks even if L. Batlin & Son, Inc. should be successful in its action, since such action would most probably be after the Bi-Centennial Year; and, perhaps most importantly, by loss of goodwill in being unable to live up to its commitments to deliver, and the tarnishing by implication of having unlawfully appropriated an exclusive design.

Herman Batlin
Herman Batlin

SUBSCRIBED and SWORN TO before me
this 1st day of May, 1975.

Mark H. Sparrow
Notary

MARK H. SPARROW
Notary Public, State of New York
No. 41-9117230
Qualified in Queens County
Cert. Filed with N.Y. County Clerk
Commission Expires March 30, 1978

Affidavit of Herman Batlin

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TELEX
423228 LBAT UI

L. BATLIN & SON, INC.

IMPORTERS & EXPORTERS
49-51 WEST 23rd STREET NEW YORK, N. Y. 10010
TELEPHONES: 212-675-5670-5671-5672CABLE ADDRESS
LOUBATLIN NEW YORKTO SANYEI CORP. (TAIWAN) LTD.
8-9 Fl., Glory Bldg.
No. 36, Sec. 1, Chang An East Road
Taipei, Taiwan
Republic of ChinaORDER DATE
8/9/74ORDER NO.
6682THIS ORDER IS VALID ONLY UPON ACCEPTANCE BY THE
SELLER OF THE TERMS AND CONDITIONS GOVERNING
SAME SET FORTH ON THE REVERSE SIDE HEREOF.

TO BE SHIPPED

HOW SHIPPED

TERMS:

Nov. 2, 1974

New York Via Panama

L/C at sight

ITEM NO.	QUANTITY	UNIT	ARTICLE AND DESCRIPTION	CASE MARKS	PRICE	TOTAL
80/325	240 doz. pc (30 ctns)	doz pc	Cast Iron Wall Decoration, 6 styles assorted. <u>Packing:</u> Each set corrugate box, 8 doz. pcs to ctn., 1.5 cft.		Ex-F FOB	
80/327	180 pcs (30 ctns)	pc	Cast Iron Mechanical Saving Bank: "UNCLE SAM" <u>Packing:</u> Each in a corrugated box, 6 pcs. to ctn., 0.9 cft.		Ex-F FOB	
80/331	300 doz (75 ctns)	doz	Papier Mache Comic Sports Saving Bank. Size: 6 1/2" 4 styles assorted: Tennis, Football, Golf & Baseball. <u>Packing:</u> Each in a box, 4 doz. to ctn., 3.8 cft.		Ex-F FOB	
TOTAL FOB AMOUNT...						

L. BATLIN & SON, INC.

AUTHORIZED BY: *[Signature]*

ACKNOWLEDGED:

DATE:

SHIPPING DATE:

DESTINATION:

REMARKS: I/I 80/325-80/327 Samples will be sent you first end of Aug.
I/I 80/331 Subject to sample approvalNOTE: PINK COPY MUST BE RETURNED AS YOUR REPLY TO: L. BATLIN & SON, INC.
49 WEST 23rd ST., NEW YORK, N.Y. 10010SIGNED: *[Signature]*EXHIBIT NO. 1

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DATE:Aug. 12. 1974

SALES MEMO NO.: _____ LB-4/152

SELLER: CHUAN CHEN MACHINERY ENTERPRISES
CO., LTD.

39-3 Ting Kaan Street
San Chung City, Taipei, Taiwan
Republic of China

SHIPMENT: Nov. 1974

TERMS: L/C at sight

DESTINATION: New York Via Panama

PURCHASER'S ORDER NO. 6682

Sales Memo

No. LB-4/152 Dated Aug. 12, 1974

Item# 80/327 Q'ty 180 pcs.

F. O. B. Price	Total	.00
----------------	-------	-----

(Ex-factory plus 5% buying commission and other inland charges).

The undersigned certifies that he is the seller of the articles described above and further certifies that on the date of this sale such seller freely offered the same merchandise for sale to all persons for export to the United States at the same price ex-factory as appears above

SELLER: CHUAN CHEN MACHINERY ENTERPRISES
CO., LTD.

F. L. See

EXHIBIT NO. 2

ISRAELI
CORPORATION

INVOICE

(TAIWAN) LTD.,
GLORY BLDG. 6th FL.,
NO. 36, SEC. 1, CHANG AN E. RD.
TAIPEI, TAIWAN
P. O. BOX 1253 TAIPEI

No. 9/Dept. #4

TAIPEI, Oct. 3, 1974

L/C No. _____ EXPORT DECLARATION No. _____

INVOICE of Advance SampleShipped per Mr. Fung on Oct. 3, 1974from Taipei, Taiwan to New Yorkby order and on account of L. BATLIN & SONS INC
49-51 West 25th Street
New York, N. Y. 10010
U. S. A.

Attn: Mr. Allen Sinitich

Marks & Nos.	C/S	Quantity	Description of Goods	Unit Price	Amount
			<u>ADVANCE SAMPLES</u>	<u>FOB TAIWAN</u>	
<u>✓</u> 50/327		1 pc.	Cast iron bank.	0/pc	\$
<u>✓</u> 50/351		4 pcs.	Papier Mache Bank.	0/doz	\$
		all samples packed one ctn.			
			TOTAL AMOUNT.....	US\$	vvvvvvvv
			SAMPLE ONLY NO COMMERCIAL VALUE		
			COUNTRY OF ORIGIN: TAIWAN		
			SANTEE CORP (TAIWAN) LTD.,		
			<u>Y. Jara</u>		

EXHIBIT NO. 3

SANYEI
CORPORATION

Affidavit of Herman Batlin

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INVOICE

(TAIWAN) LTD.,
GLORY BLDG. 889 FL.,
NO. 36, SEC. 1, CHANG AN E. RD.
TAIPEI, TAIWAN
P. O. BOX 1253 TAIPEI

No. IE-75-01
TAIPEI, Dec. 31, 1974

L/C No. 101093 EXPORT DECLARATION No. TH63-40923

INVOICE of Cast Iron Ware.

Shipped per S.S. "SANGHIN STAR" V-49 on Dec. 31, 1974

from Keelung, Taiwan, to New York

by order and on account of L. Batlin & Son, Inc.

49 W. 23rd St. New York, N.Y. 10010

Marks & Nos.	C/S	Quantity	Description of Goods	Unit Price	Amount
L	B			<u>Ex-factory Price</u>	
<div>60/327</div>	30 Ctn.	100 Pcs.	Order No. 6682 dated Aug. 12, 1974 Item No. 60/327 Cast Iron Mechanical Saving Bank "UNCLE SAM"	US\$	US\$
6 PCS NEW YORK VIA AIRMAIL C/1-30 MADE IN TAIWAN REPUBLIC OF CHINA					
- ditto - 60/326	1 Ctn.	36 Set.	Order No. 6683 dated Aug. 12, 1974 Item No. 60/326 Wooden Cabinet w/4 pcs. miniatures decoration. Size: 5 1/2" x 7" N.W.: 0.40 lbs/doz. Breakdown Cost: Wooden US\$0. Alumi. 0. US\$0.	US\$	US\$
36 SETS. C/NO.1					
Name and Address of Seller:					
Item No. 60/327 Chuan Chen Machinery Enterprises Co., Ltd. 39-3, Ting Kuen Street San Chung City, Taipei, Taiwan.			Total Ex-factory Price: Commission: Inland Freight: Storage: Customs Brokerage: Other Charge: FOB Keelung:		
Item No. 60/326 Ging Min Shing Industries Corporation, Ltd. No. 217 Nan Yo Road, Chan Hwa, Taiwan.			US\$ US\$ vvvvvvvvv		
SANYEI CORPORATION (TAIWAN) LTD.					

L. BATLIN & SON, Inc.

IMPORTERS AND EXPORTERS
49 WEST 23RD STREET, NEW YORK, N. Y. 10010
PHONE: OREGON 2-5670



No. 80/327 .. Cast Iron Mechanical
Swing Bank, "Uncle Sam" style.
Colorfully decorated, ea. in corre-
ated box, 12 pc. ctn.

EXHIBIT NO. 5

INVOICE NO. 220

Dr. to SUMWAL

CORPORATION LTD.

1511 WU SANG HOUSE
NO. 655, NATHAN RD., KOWLOON

HONG KONG

3-962239

TELS. 3-961700

3-956642

Messrs. L. Batlin & Son Inc.,
49-51 West 23rd St,
New York, N.Y. 10010,
U. S. A.

AIR PARCEL

Date, January 4, 1975.

ADVANCE SAMPLES

FOB HONGKONG

AMOUNT

96/268

3 Pcs. 9"(H) Plastic Uncle Sam
Saving Bank.

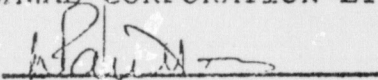
1/Doz

US\$

=====

ORIGIN: HONG KONG.
SAMPLES OF NO COMMERCIAL VALUE.

SUMWAL CORPORATION LTD,


PAUL LAM

E. & O. E.

An official receipt will be issued against payment

Affidavit of Mark H. Sparrow
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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- - - - -x

L. BATLIN & SON, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	75 Civ. 2036
JEFFREY SNYDER, d.b.a. JSNY,	:	
ETNA PRODUCTS CO., INC., and	:	
UNITED STATES CUSTOMS SERVICE,	:	
	:	
Defendants.	:	

- - - - -x

AFFIDAVIT OF MARK H. SPARROW

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

MARK H. SPARROW, being duly sworn, deposes and says that:

I am a member of the firm of Jacobs & Jacobs, P. C.,
attorneys for the plaintiff L. BATLIN & SON, INC.;

On May 1, 1975, at approximately 4:00 P. M., I spoke by
telephone with Miss Eleanor M. Suske, Chief of the Imports
Compliance Branch, U. S. Customs Service in New York; I advised
Miss Suske of the nature of this Action and that I was going to
appear tomorrow, May 2, 1975, at 10:00 A. M., in the U. S.
District Court for the Southern District of New York, to request
an Order Restraining the United States Customs Service from
enforcing the copyright on the Uncle Sam Mechanical Bank;
Miss Suske advised that no one would appear on the behalf of the
United States Customs Service, and requested that I advise her of
the outcome of our request;

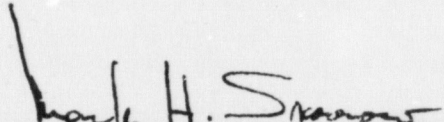
On the same date, at approximately 4:05 P. M., I telephoned the office of Etna Products Co., Inc. and requested to speak to Mr. Jeffrey Snyder and Mr. Fred Snyder; I was advised that both Mr. Jeffrey Snyder and Mr. Fred Snyder were out of the country, after which I spoke to Mr. Grober, who advised me that he was the Office Manager. I advised Mr. Grober of the nature of the Action and that I was going to appear tomorrow, May 2, 1975, at 10:00 A.M. in the United States District Court for the Southern District of New York, to request an Order Restraining Jeffrey Snyder and Etna Products from enforcing the copyright on the Uncle Sam Mechanical Bank. I advised Mr. Grober that I would telephone his attorney and give him the same information, and Mr. Grober thanked me for telephoning and said that his attorney will attend to it;

On the same date, May 1, 1975, at approximately 4:10 P. M. I telephoned Mr. Robert Faber, attorney for Snyder and Etna Products and advised him of the nature of the Action and that I was going to appear tomorrow, May 2, 1975, at 10:00 A. M., in the United States District Court for the Southern District of New York to request an Order Restraining his clients and the Customs Service from enforcing the copyright on the Uncle Sam Mechanical Bank. He advised me that he would be in Court at the same time, before Judge Carter, but that he would like to appear with respect to the issuance of a Temporary Restraining Order. I advised that I would so advise Judge Metzner;

I believe that, in view of the probability that the Court will find the copyright of Defendant, Jeffrey Snyder to be

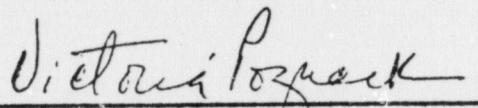
invalid, and that the plaintiff is suffering irreparable harm, a Temporary Restraining Order and Preliminary Injunction should be granted;

No request for similar relief has heretofore been made in this action.



Mark H. Sparrow

SUBSCRIBED AND SWORN TO before me
this 1st day of May, 1975



Notary
VICTORIA POZNACK
Notary Public, State of New York
No. 31-3152200
Qualified in New York County
Commission expires March 30, 1977

Affidavit of Jeffrey Snyder
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A-36

-----X
L. BATLIN & SON, INC.,

Plaintiff,

v.

JEFFREY SNYDER, d.b.a. J.S.N.Y.,
ETNA PRODUCTS CO., INC. and
UNITED STATES CUSTOMS SERVICE,

Defendant.

:

: Civil Action No.

: 75 Civ. 2036

:

:

:

-----X
AFFIDAVIT OF JEFFREY SNYDER

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JEFFREY SNYDER, being duly sworn, deposes and says:

1. I am one of the defendants in this action. I have been doing business in the State of New York under the name and style, "J.S.N.Y." and that is a name by which products produced at my request have come to be known in the novelties trade. A certificate has been filed with the County Clerk of New York County, recording the name "J.S.N.Y." as my business name.

2. I am also an officer of the defendant ETNA PRODUCTS CO., INC., to wit, its Executive Vice-President.

3. ETNA PRODUCTS CO., INC. is a corporation of the State of New York, having its principal office at 53 West 23rd Street, New York, New York 10010. ETNA was incorporated in 1946.

4. ETNA PRODUCTS CO., INC. is involved in the business of selling at wholesale and distributing inexpensive works of art, novelties, imported goods, and the like. It began in 1946 with the wholesaling and distributing of the foregoing goods and has been continuously involved in that

business for the last 29 years.

5. Since 1946, ETNA has offered for sale and sold to its customers countless different products. Some have been readily accepted by its customers and ETNA has found them to be profitable products. Some have not been acceptable and ETNA did not make any profits on them. As detailed further below, the present action involves a self-standing novelty savings bank, referred to as the "Uncle Sam Bank", which was designed for me at my request and in accordance with my instructions. I have licensed ETNA to offer this Bank for sale. ETNA has been selling this bank as its Item No. 8470.

6. As detailed further below, the acceptance of the Uncle Sam Bank by ETNA's customers has already been quite significant. By the time ETNA is finished offering for sale and selling this product, it is my belief that the volume of sales in this single product will be so large as to be unprecedented in ETNA's history.

7. In January, 1974, in New York City, I happened to see an attractive antique, cast metal child's savings bank, having an "Uncle Sam" (the American folklore symbol for the U.S.A.) figure standing atop a decorated box-like platform. The overall height of the figure and the box was 11 inches.

8. This item seemed quite timely for inclusion in ETNA's product line because of the upcoming U.S. Bicentennial. I purchased this antique bank.

9. In April, 1974, I flew to Hong Kong to, among other things, arrange for the design, creation and eventual manufacture of the Uncle Sam Bank to be included in ETNA's product line. When I flew to Hong Kong in April 1974, I brought the cast metal Uncle Sam Bank with me. I brought the item to Sanyei Corporation of Hong Kong, my buying agent in Hong Kong and asked Sanyei whether we could produce this item for sale in ETNA's product line. Sanyei checked with

several mold makers and finally selected Unitoy, because their price and their quality were thought to be of the highest order.

10. While I was in Hong Kong in April, a representative of Unitoy came to Sanyei's office and met with me and with Mr. Hara of Sanyei. We decided that a product of this type, of appropriate appearance and properly priced and packaged, might be a successful item in ETNA's line of products.

11. Before going into the artistic considerations, which my proposed Uncle Sam Bank should have, we discussed those functional and mechanical considerations which the Uncle Sam Bank would have to meet. I wanted the bank to be made of plastic. I thought that the plastic bank should be shorter than the cast metal sample in order to fit into the required price range and quality and quantity of material to be used. Some of the changes that we decided upon in order to make the item more salable, more easily transportable and more attractive included shortening and narrowing the base and shortening the figure. We further decided to change the shape of the satchel or carpetbag and to include the umbrella in a one-piece mold for the Uncle Sam figure, so as not to have a problem with a loose umbrella or a separate molding process. Other changes, as detailed below, were to be made for artistic reasons.

12. The Unitoy representative made some drawing sketches of an Uncle Sam bank, while he was looking at the cast metal statue while making these sketches. As we were drawing the sketches, our initial feeling had been to make the statue in plastic 10 inches high.

13. About a week later, while I was still in Hong Kong, Unitoy had made a clay model, 10 inches in height, Uncle Sam bank, presumably using the sketches as a guide for this clay model. The same people again met at Sanyei's office

and discussed the 10 inch high clay model. It was decided that the esthetic appearance would be improved by a uniform size reduction changing all parts proportionately. In addition, we felt that the item could be made smaller. We decided to try for a 9 inch high statue.

14. Unitoy promised to make a prototype in plastic 9 inches high within 30 days. I then returned to New York.

15. In May 1974, about 30 days later, Sanyei received a prototype in plastic from Unitoy and Sanyei air mailed the prototype to me in New York for approval. I studied the prototype, approved it and then told Sanyei to proceed in preparing the final mold and I placed an order for Uncle Sam banks made from that mold.

16. I gave an ETNA money order to pay for the mold and the designing of the Uncle Sam Bank payable to the Sanyei Corp. in the total amount of \$2,050.00. This was my only payment for that mold. But the mold work and designing was considerably more expensive. This also is evidence of the creativity and originality involved in this item.

17. Sanyei contributed the same amount as I contributed to the mold as their share of the cost of the mold, whereby the mold actually cost \$4,100.00.

18. In addition to the actual expenses for production of the mold, there were the expenses of Unitoy and Sanyei, for which direct compensation was not requested, particularly the time and effort spent in making the sketches, holding conferences, making the designs, making the preliminary models, etc. Unitoy and Sanyei would expect that the time spent would be compensated by the price paid by Snyder and Etna for the final molded products. Yet, the hidden cost of these items must enter into the value of the original creative work.

19. Furthermore, my trip to Hong Kong which in part involved the Uncle Sam bank involved out of pocket expense to defendants. I estimate the properly apportioned share of that particular trip to Hong Kong, at about \$500.00. In summary, the Uncle Sam bank was a major, expensive original, creative work authored by and created for me and at my request.

20. Because of the numerous steps involved in the creation of my 9-inch tall plastic Uncle Sam Bank, and because of my desire and the desire of the artistic people with whom I work to make a good looking Uncle Sam Bank, numerous differences developed between the cast metal public domain Uncle Sam Bank and my plastic Uncle Sam Bank. A comparison of the sample cast metal Uncle Sam Bank which is being submitted with my plastic copyrighted work shows the vast differences which enhance the originality of my work. These differences include the height difference between the two statues, the resulting proportional length, width and thickness differences arising principally from the height difference. But there are other differences. The shape and design of the carpetbag or satchel are different. The satchel in the cast metal bank is fatter at its base, whereas the taper in the satchel of the plastic Uncle Sam bank is more uniform. The surface texturings of the carpetbags are quite different. The eagle on the front of the platform in the cast metal bank is holding arrows in its claws. In my copyrighted work, the eagle is perched on a branch holding leaves. I found that the arrows did not reproduce well in plastic on a smaller size and, therefore, made this change. The shape of the face on my copyrighted work and on the cast metal statue is quite different. The expressions on these faces is quite different. No one would confuse these two faces as

the same. The shape of the hats on the two statues is quite different. The surface texturing of the hats is quite different. In the cast metal version, the umbrella is hanging loose, whereas the umbrella on the plastic item is fastened tightly and is included in the single mold. The shape of the fingers on my plastic copyrighted work are clearly defined. In the cast metal work, there is only the suggestion of a hand and the fingers are not outlined. The surface texture of the clothing in the cast metal item has many more creases and folds and has different surface texturing than in the clothing of the plastic model. The color of the eyebrows differs. The hairline, especially at the back of the head, differs. The shape and decoration on the bow ties differ. The shape, the folds in and the color of the upstanding shirt collars differ. The shape of the left arm in the metal casting is quite different from the plastic work. In the metal casting, the arm is quite wide at the top and quite narrow at the bottom and the arm has a bend in it. In the plastic work, the arm is more uniform and does not have the same sort of bend. The shape of the flag carrying the name "Uncle Sam" on the base of the statue is different. The print on these two flags is different. The surface texture, appearance and bodily shape of the eagles on the side of the platforms is different.

21. My design for an Uncle Sam bank is an original design which was produced under my direction and at considerable expense to me, and this design is a valuable property of mine which I wish to protect against any injury and/or misappropriation.

22. In the mold produced by Unitoy, there was incorporated the copyright notice " © Copyright J.S.N.Y. 1975". January 1975 is the start of the new season for trade

shows and I had anticipated that the Uncle Sam Bank would first be shown and published in 1975.

23. I subsequently realized that this bank would first be published in 1974 and ordered that the legend "1975" be removed from the mold and, therefore, from all subsequent specimens of the Uncle Sam bank produced from the mold. Upon the removal of the "1975" legend, the mold carried the legend, inter alia, "(C) Copyright J.S.N.Y.". A sample of my Uncle Sam bank is submitted with this Affidavit.

24. My records indicate and my recollection is that on October 15, 1974, I made my first publication of my copyrighted "Uncle Sam" bank.

25. My work of art was filed with the Register of Copyrights and received Copyright Registration No. Gp 95881 on January 23, 1975. A copy of my Copyright Certificate is attached hereto. As noted above, the fact that this design is now and has always been protected by my copyright has been conspicuously embossed on the rear surface of the platform on which the Uncle Sam character of my bank stands.

26. ETNA began soliciting sales of its copyrighted Uncle Sam bank on or about October 15, 1974. I and ETNA's employed salesmen and commissioned salesmen showed samples and photographs of my Uncle Sam bank to our regular customers and our prospective customers. Much to my delight, nearly all of our customers expressed interest in the Uncle Sam bank and we received numerous orders and intentions to buy this product.

27. ETNA has not previously had such immediate and widespread customer acceptance of one of its products. As this bank was introduced only a few months ago, we have great expectations that sales of this item will continue to increase significantly for two or more years.

28. I became aware that L. BATLIN & SON, INC. was offering for sale and selling my copyrighted 9-inch tall plastic Uncle Sam Bank at the beginning of February, 1975. I, therefore, instructed my attorneys to notify plaintiff that they were infringing my copyright registration and to ask them to cease their infringement. In succeeding communications received by my attorneys from the attorneys for plaintiff, the plaintiff's attorneys indicated their belief that my copyrighted bank could not be copyrightable because they were aware that the bank was in the public domain, particularly making reference to the cast metal Uncle Sam bank which, I admit, was my inspiration for my plastic copyrighted work.

29. At that time, I instructed my attorneys to apply to the United States Customs Service to block importation of infringements of my copyrighted work and I am informed and believe that they have done so.

30. I compared the plastic Uncle Sam Bank of L. BATLIN & SON, INC. with my own, which is presently being sold by ETNA and find that they are identical.

31. As a result of plaintiff's offering for sale and selling the identical plastic bank to mine, and offering this bank for sale at a cheaper price than I have offered the bank at, both ETNA and I have already been severely damaged by plaintiff's activities and if these activities are permitted to continue, the damage will continue and be irreparable.

32. Since BATLIN began offering its Uncle Sam bank for sale, ETNA's sales for this item have dropped considerably and cancellations and reduction of quantities have occurred. I attribute a large part of this drop in sales to BATLIN's inroads on this product and their communication with our customers and their taking orders from our customers.

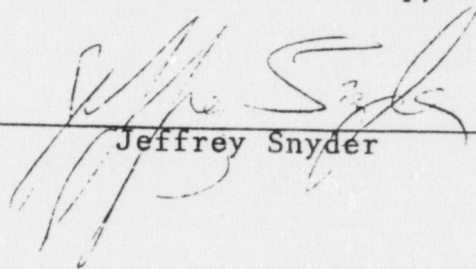
33. In addition to lost sales, since January 10, 1975, ETNA has had many orders on its Uncle Sam bank cancelled by its customers. Customers do not usually cancel recent orders for an item, unless a competitor's item is offered to them at a lower price.

34. Many other customers have refused to commit themselves due to the low price offered by BATLIN. This means that they placed only very small orders with us (25 dozen instead of 100 dozen in a typical case) and they held back on ordering more from ETNA to see just what BATLIN will deliver and because they feared that with BATLIN's competition, the price on the item would fall off quite considerably. The damage to ETNA from these reduced orders is quite significant.

35. The adverse effects of BATLIN's having a lower offering price cannot be emphasized too much. ETNA has the reputation of offering a good, fair price. ETNA's customers will come to now believe that ETNA is overcharging them on the Uncle Sam bank, because of BATLIN's low price. This will carry over to all other ETNA products and customers may feel that we overcharge on everything. Our customers will lose faith in ETNA and its personnel. The long term damage from this is incalculable.

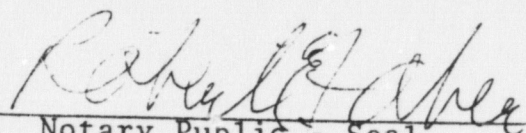
36. Furthermore, ETNA has attempted to establish good will by representing that the Uncle Sam bank was its licensed design and product, protected, inter alia, by copyright. ETNA's good will, reputation in the trade and credibility is bound to be severely damaged by BATLIN's activities in attempting to sell the identical product, in flagrant contradiction to ETNA's claims to rights under this copyrighted design. The damage to defendants if BATLIN is permitted to continue such activity is both irreparable and incalculable.

37. In view of the foregoing, I believe that my copyrighted Uncle Sam bank is validly copyrighted and that plaintiff BATLIN has infringed my valid copyright.



Jeffrey Snyder

Sworn to before me this
5 day of May, 1975.



Notary Public - Seal

ROBERT C. FABER
Notary Public, State of New York
No. 03-0219595
Qualified in Bronx County
Commission Expires March 30, 19.....

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Page 3

Certificate

Registration of a Claim to Copyright

in a work of art or a model or design for a work of art

FORM G

REGISTRATION NO.

GP 95881

DO NOT WRITE HERE

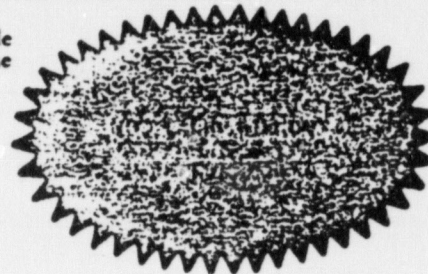
CLASS

G

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Barbara Rieger

Register of Copyrights
United States of America



1. Copyright Claimant(s) and Address(es):

Name Jeffrey Snyder, conducting business under the name J.S.N.Y.Address 53 West 23rd Street, New York, New York 10011

Name _____

Address _____

2. Title: UNCLE SAM BANK
(Title of the work)3. Nature of Work: Sculpture
(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) _____ ☐ Weight (in pounds) _____
☐ Size (give dimensions) _____ ☐ Fragility (give details) _____

5. Author (i.e., Artist):

Name Jeffrey Snyder Citizenship U.S.A.
(Legal name followed by pseudonym if latter appears on the copies) (Name of country)Domiciled in U.S.A. Yes X No _____ Address 53 West 23rd Street, New York, N.Y. 10011

6. (a) Date of Publication:

October 15 1974
 (Month) (Day) (Year)

(b) Place of Publication:

U.S.A.
 (Name of country)

(c) Manufacture Outside United States by Lithographic or Photoengraving Process:

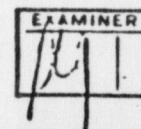
7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____

Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____

Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version:

Complete all applicable spaces on next page



8. Deposit account:

9. Send correspondence to:

Name Ostrolenk, Faber, Gerb & Soffen Address 260 Madison Avenue, New York, N.Y. 100

10. Send certificate to:

(Type or
print Name
name and
address)
AddressOSTROLENK, FABER, GERB & SOFFEN260 Madison Avenue

(Number and street)

New York

(City)

New York

(State)

10016

(ZIP code)

Information concerning copyright in works of art

When to Use Form G. Form G is appropriate for unpublished and published works of art, models and designs for works of art.

What Is a "Work of Art"? This category (Class G) includes works of the fine arts, and works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned. Common examples of works of art are

paintings, drawings, sculpture, ceramics, artistic jewelry, original designs applied to textiles, and the like.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

Unpublished works of art

How to Register a Claim. To obtain copyright registration, mail to the Register of Copyrights, Library of Congress, Washington, D.C. 20559, a photograph or other identifying reproduction of the work, an application on Form G, properly completed and signed, and a fee of \$6. Deposits are not returned, so do not send your only copy.

Procedure to Follow if Work Is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published edition must contain a copyright notice in the required form and position.

Published works of art

What Is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. Unrestricted public exhibition of a work of art may also constitute publication.

How to Secure Copyright in a Published Work of Art:

1. Produce copies with copyright notice.
2. Publish the work.
3. Register the copyright claim, following the instructions on page 1 of this form.

The Copyright Notice. In order to secure and maintain copyright protection in a published work, it is essential that all copies published in the United States contain the statutory copyright notice. The notice should ordinarily consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner. The year date of publication may be included in the notice, but normally it is not required.

—Alternative Form of Notice. As an alternative, the notice for works of art may consist of the symbol ©, accompanied by the initials, monogram, or mark of the copyright owner, provided the owner's name appears on some accessible part of the copies.

—Universal Copyright Convention Notice. Use of the symbol © with the name of the copyright owner and the year date of publication may result in securing copyright in countries which are parties to the Universal Copyright Convention, which protection might not be obtained by use of either of the alternative forms of notice. Example: © John Doe 1973.

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If you consider that first publication of your work took place by means of its unrestricted public exhibition with copyright notice, you may deposit photographs of the work.

NOTE: If copies are published without the required notice, the right to secure copyright is lost and cannot be restored.

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Application received <u>JAN 22 1975</u>	Two copies received <u>JAN 22 1975</u>	Photographs or reproductions received
One copy or reproduction received		
Fee received <u>143401 JAN 16 75</u>		

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 L. BATLIN & SON, INC.,

4 Plaintiff,

5 vs.

6 JEFFERY SNYDER, ET AL.

7 Defendants

75 Civ. 2036

10 BEFORE: HON. CHARLES L. METZNER, D. J.

May 6, 1975
Room 705

13 APPEARANCES:

14 MARK H. SPARROW, ESQ., and
15 BRUCE M. COLLINS, ESQ.,
Attorneys for Plaintiff

16 ROBERT C. FABER, ESQ.,
17 Attorney for Defendant

19 ALSO PRESENT:

20 PATRICK H. BARTH, ESQ.,
21 United States Customs Service

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2 THE COURT: Mr. Sparrow.

3 MR. SPARROW: Yes, sir. I just have a brief open-
4 ing statement and I will put my witness on the stand.

5 THE COURT: All right.

6 MR. SPARROW: This is a hearing for a preliminary
7 injunction and it is not a trial on the merits. I think
8 that from looking at the defendants papers he is categorizing
9 it as a trial on the merits, which I don't think is a function
10 of a hearing of this sort.

11 I think that all that has to be established are three
12 elements: Number one, the likelihood that plaintiff will be
13 successful at the ultimate trial; two, that plaintiff is
14 suffering irreparable damage; and, three, that the plaintiff's
15 irreparable damage outweighs any potential damage of de-
16 fendants' if the injunction were granted, and I feel that we
17 have met the latter two elements to the affidavit of plain-
18 tiff's precedent, which indicated that orders are presently
19 being cancelled by virtue of the holdup at customs and that
20 their good will is being impaired.

21 As to the first element, namely the likelihood of
22 success, I intend to call one witness who is an expert in the
23 area of model-making and design who can give the court his
24 best opinion of whether the work is original enough to be
25 capable of being copyrighted.

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2 THE COURT: All right, proceed.

3 MR. SPARROW: Mr. Bloch.

4
5 W I L L I A M J. B L O C H, called as a witness in
6 behalf of the plaintiff, after having been duly sworn,
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. SPARROW:

10 Q What is your business?

11 A I'm a designer and modeler.

12 Q By whom are you employed.

13 A A number of accounts. I have exactly six accounts.

14 - You want their names?

15 THE COURT: Are you an independent?

16 THE WITNESS: I'm a freelance designer and modeler.

17 Q Are you in any way related or connected with the
18 plaintiff in this action?

19 A No.

20 Q Have you ever done any work for the plaintiff in
21 this action?

22 A No.

23 Q Are you being compensated for your appearance here
24 today?

25 A Yes.

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2 Q Would you tell the Court, please, what your exper-
3 ience is in the modeling, designing and molding industry?

4 A Well, I work principally for the lighting fixture
5 people in anything that could be made in zinc aluminum or
6 in plastics or plaster or china, and that is it. I make
7 designs and models for anybody that wants it made.

8 Q In other words, you sculp them?

9 A I sculp them, yes.

10 Q What is the usual way that a client would come to
11 you and ask whether you would design them a particular item?

12 A Well, he will call me and we will sit down and
13 discuss what he wants made and I will make up a number of
14 designs, thumb nail sketches, and from there we pick out
15 whether they want to produce. From that we pick a model and
16 from that they make a working mold which I have nothing to do
17 with. I just make the original models. They are in plaster.
18 I make all my models in plaster.

19 Q Are you familiar with the molding business?

20 A Yes. The technical end of it?

21 Q Yes.

22 A Yes.

23 Q Do you have anything with you that would just be an
24 example of something that you made?

25 A I put -- it is the only thing I had on quick notice

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Bloch-direct

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that was in my studio. It is under the table. It is part of a base for a lamp.

MR. SPARROW: Your Honor, we are not intending to introduce this but just to show the kind of work that Mr. Bloch is capable of.

THE COURT: Let me see it.

You say from this model a mold is made?

THE WITNESS: A mold is made. Then another half is made and put together. This isn't what I present to the customer. This is for my own functioning when I make a duplicate of this for the other side. I don't model two of them. I just model them, make a mold and then cast it and then put two together, and this is what I submit. This is the same thing as on the other side. It is a base.

THE COURT: Go ahead.

Q Do you work in the sculptural effects; is that all your own work?

A Yes.

Q Did you copy that from anything?

A No.

Q This was entirely an original work?

A It was a design made, yes.

Q Do you recall how you went about designing it?
In other words, did you use any references?

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Bloch-direct

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2 A Oh, yes, references of ships and --

3 Q Would you say it is a copy of anything?

4 A It is a ship. It is not a copy of -- it is not a
5 copy.

6 MR. SPARROW: Can we mark these as Plaintiff's
7 1 and 2?

8 (Plaintiff's Exhibits 1 and 2 marked for
9 identification.)

XXX

10 Q I show you two banks which have been marked
11 Plaintiff's Exhibits 1 and 2 for identification, number 1
12 being the cast iron model and number 2 being the plastic.
13 I ask you, based upon your experience, would you say that
14 Exhibit 2 is a copy of Exhibit 1?

15 MR. FABER: Objection. The witness is not quali-
16 fied and has not shown to be an expert qualified to give that
17 opinion.

18 THE COURT: Overruled.

19 A Well, it is a copy.

20 Q Would you say there is any degree of originality
21 existing in Exhibit 2 over Exhibit 1?

22 MR. FABER: Objection. A legal conclusion is being
23 asked for. The original is defined in the copyright at,
24 copyright regulations. That's the province of the Court,
25 legal conclusions.

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THE COURT: Go ahead and answer.

Q You may answer the question.

A What was the question?

(Question read.)

A No.

Q Would you say there are any planes, lines or geometric patterns that are interdependent with each other in this multi-dimensional work?

A There is a little change here, but basically it is a copy.

THE COURT: You say there is a little change here. I don't know what you are talking about.

THE WITNESS: This is plain.

THE COURT: You are referring to Exhibit 2.

THE WITNESS: That satchel that he has here Exhibit 2.

THE COURT: We have Plaintiff's Exhibit 1 for identification, a metal Uncle Sam's bank, and Plaintiff's Exhibit 2, a plastic Uncle Sam's bank; right?

THE WITNESS: Right.

THE COURT: You say Exhibit 2 is a copy of Exhibit 1?

THE WITNESS: Correct.

THE COURT: Because there is nothing original in

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2 Exhibit 2?

3 THE WITNESS: Correct.

4 THE COURT: Which is which? I don't know which
5 is which.6 MR. SPARROW: The defendant conceded that Exhibit
7 2 is their bank.8 MR. FABER: We concede that 2 is an example of
9 defendants' product and so stipulated.10 MR. SPARROW: I think through the defendant's
11 testimony a similar copy --

12 MR. BARTH: The government has no objection.

13 MR. FABER: Plaintiff's Exhibit 1 is a typical
14 example.

15 THE COURT: Let's let them both in.

16 (Plaintiff's Exhibits 1 and 2 received in
17 evidence.)

XXX

18 THE COURT: Now that I know which is which, Mr.
19 Bloch, tell me what in Exhibit 2 is different from Exhibit 1,
20 if anything.21 THE WITNESS: One thing, it has markings on it
22 whereas the plastic one is plain.23 THE COURT: What is the difference between Exhibit
24 1 and Exhibit 2?

2 25 THE WITNESS: Well, the exhibit with the hat on,

1 mccg Bloch-direct 9

2 Exhibit 1, is rough where this one is plain. This satchel
3 here is rough and this one is plain. That is the only dif-
4 ference that I can see in it.

5 THE COURT: There is a different contour; Isn't
6 that right?

7 THE WITNESS: Slightly.

8 THE COURT: The satchel?

9 THE WITNESS: It has a different contour but it is
10 just a plain satchel.

11 THE COURT: Go ahead.

12 Q Would you say that any of those differences were
13 novel?

14 A No.

15 Q How would you characterize them? Why would they
16 have been made?

17 A I thought that the reason the change was made was
18 because it is easier to manufacture a piece like this that it
19 is a piece like that. It is the only difference I can see.

20 Q In other words, it is easier to manufacture
21 Exhibit 1, the smooth one?

22 A The smooth one,

23 Q Than the rough one?

24 A Than the rough one.

25 Q Would you say, in other words, that it was

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Bloch-direct

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2 utilitarian as opposed to artistic?

3 A Yes.

4 THE COURT: When you say easier to manufacture,
5 you mean in plastic or metal?

6 THE WITNESS: In plastic.

7 Q Would you say that it is an aggregation of known
8 components?

9 A Yes.

10 Q What would you say the level of the skill would
11 be the maker of Exhibit 2; would it be a high level of skill?
12

13 A No.

14 Q Would you characterize it as a mere trivial varia-
15 tion?

16 A Yes.

17 Q Is it simply a reproduction of the metal bank?

18 A Yes.

19 Q Made as simple as possible?

20 A Yes.

21 Q For purposes of manufacture?

22 A Yes.

23 Q Would you say there is any element of novelty as
24 contracted with the material previously known?

25 A No.

THE COURT: By the material you mean the metal as

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Bloch-direct

11

2 opposed to plastic?

3 THE WITNESS: That is correct.

4 Q Would you say there is any individuality in Exhibit
5 2 as opposed to Exhibit 1?

6 A The only thing I can say is that it is a copy.

7 Q Do you say that it is nothing more than slavish
8 imitation and direct copying?

9 A Pardon?

10 Q Slavish imitation?

11 A I don't know quite what you mean by slavish.

12 THE COURT: It is a word from the law books.

13 THE WITNESS: I see.

14 Q Merely a direct copy?

15 A It is a direct copy as far as I can see.

16 Q Would you say that the size differential was pro-
17 portionate; in other words, everything was just proportionately
18 reduced?

19 A Yes. Now, as to the exact measurement, that I can't
20 say. I never measured it. I'd have to use calipers and
21 find out whether it is an exact copy of it. This I don't
22 know.

23 Q Would you say that there was any artistic contri-
24 bution in making that?

25 A No.

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Bloch-direct /cross

12

THE COURT: Making what?

MR. SPARROW: Exhibit 2.

That is all.

MR. FABER: I have some questions on cross-examination.

CROSS-EXAMINATION

BY MR. FABER:

Q Mr. Bloch, you said that you were in the business of making molds; is that correct?

A Models, principally. I also make molds.

Q Do you make models in plastic?

A In plaster.

Q Have you ever made a model in plastic?

A Not in plastic. I made models in plaster to be used in plastics.

Q Have you ever cast or molded a work made of plastic material?

A Personally if I -- no.

Q Have you ever supervised the molding of a product made in plastic material?

A No.

Q Now, have any plaster items that you have made been made for the purpose of being molded in plastic material?

A Years ago, yes, blow molding.

2 Q How many years ago?

4 Q Would it be correct to say that your most recent,
5 relevant experience in plastic material molding was about 12
6 years ago?

8 Q Is it correct to say that your principal molding
9 has been in connection with lighting fixtures and trainer?

11 Q Has it been in connection with models?

13 Q I believe you testified that to make the ship model
14 which you showed here that a sketch would be necessary; is
15 that correct?

17 Q Who would have to make that sketch?

19 Q Could a person without artistic ability make such a
20 sketch?

22 Q So you have to be somewhat artistic to make such a
23 sketch?

25 Q Would you say that artistic training is necessary

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Bloch-cross

14

2 to make such a sketch?

3 A Yes.

4 Q You have further testified that from the sketch you
5 made a model or you make a model; is that correct?

6 A That is correct.

7 Q What sort of skill does a person have to have to
8 make that model?

9 A It depends on the model.

10 Q Does a person have to have any artistic ability at
11 all?

12 A Some, yes. Again it depends on the type of model
13 you make.

14 Q Please explain it further. What type of model
15 would not require artistic ability?

16 A A simple turning.

17 Q Is there any example present here in the room of a
18 simple turning?

19 THE COURT: You mean Exhibits 1 and 2?

20 MR. FABER: I mean in the room.

21 THE COURT: In the whole room.

22 MR. FABER: It is a term I'm not familiar with.

23 A That is a turning at the base of the flagpole.
24 It is a simple turning.

25 Q Would it be fair to say that it is a very simple

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2 symmetrical, almost round sculpture?

3 A Yes.

4 Q Would it be possible to make Plaintiff's Exhibit 2,
5 which is the plastic Uncle Sam bank by a simple turning?

6 A No. Oh, no, that is models --

7 Q That is model making?

8 A I would think so.

9 Q Does it require sculpting to make Plaintiff's
10 Exhibit 2?

11 A A certain amount, yes.

12 Q I direct your attention to Plaintiff's Exhibit 1,
13 the metal bank and ask you the steps that to your knowledge
14 would have to go into going from Plaintiff's Exhibit 1 to
15 Plaintiff's Exhibit 2?

16 A First of all, a drawing would have to be made.

17 Q A drawing would have to be made?

18 A Yes.

19 Q Who would make that drawing?

20 A A designer.

21 Q Could a layman, without any experience, make that
22 drawing?

23 A Yes, I'd say --

24 Q He could?

25 A Yes.

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Q Could I make that drawing?

A Well, if you have a copy here in front of you there is no problem to making your drawing. It is not original.

Q Could I make that drawing?

THE COURT: He does not know how well you draw.

MR. FABER: That is the whole point.

Q Can Judge Metzner make the whole drawing?

THE COURT: Yes.

A Yes, as long as you have something to copy it is comparatively simple.

Q If I had something to copy I could make the drawing, the sketch?

A I would think so.

Q Would I have to make the drawing sketch by tracing?

A Not necessarily. You just could look at it.

Q Could I make it free-hand?

A Yes.

Q I'd have to make a drawing?

A Yes.

Q What would the next step be?

A A model is made.

Q How would that model be made?

A Sometimes it is carved. Sometimes it is molded in plastilene. Sometimes it is carved in plaster. Sometimes it

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is carved in wood.

Q And following that, now, from your knowledge of plastic molding, following the making of which it is either sculptured or carved, what is the next step?

A I'd say you have to make a model.

Q You have to make a model?

A Yes.

Q The sculpting that you talked about was not the model?

A The sculpting?

Q You talked about a sculpture or plastic work that has to be made. Was that a model that you were referring to?

A Yes.

Q Following that sculptured model, what is the next step?

A Dies have to be made, molds.

Q Who would make the dies and molds?

A That is up to the die maker.

Q A mold maker would have to make them?

A A mold maker or a die maker. It depends on what way you are working, in what dies you are working.

Q Is it correct, do I correctly understand your testimony to say that you could not go from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2 without making a drawing

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or sketch?

A I wouldn't need a drawing to make that. I could do it.

Q You could go from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2 without making a model, without sketching a model?

A No, you have to make a model.

Q You would have to sculpt a model?

A Well, it depends upon how the die is made. A die could be made. Now, I don't know how these dies are made.

Q We'll assume now that a die has to be formed in some manner?

A Right.

Q Could a layman do that? Somebody with no background?

A No.

Q Somebody with artistic training would be needed to do that?

A Again, it depends upon the model.

Q In the case of Plaintiff's Exhibit 2.

A Well, I don't know how they made the die. Again, it could be hobbled out and a chaser would chase it out and clean it up, so I don't know whether a model is made for this piece, for the base of it. This all could be put in in steel and in reverse, so I don't know how this is made.

Q If you were given Plaintiff's Exhibit 1 and asked

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2 to make Plaintiff's Exhibit 2 from that --

3 A How would I go about it?

4 Q We heard already how you would go about that. What
5 I am asking you is whether an artist would be necessary, a
6 sculpture or somebody with artistic ability would be needed
7 to go from Plaintiff's Exhibit 1 to 2.

8 A A certain amount of ability.

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Q You were asked by plaintiff's counsel whether you thought that there was originality, and that was the term he used, in going from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2, and I believe your testimony was that there was not originality.

A Yes.

Q What are the criteria that you used for defining originality?

A Well, a complete change. You can use Uncle Sam but change it -- you could have Uncle Sam kicking the coin into a bucket. That would be a change.

Q You would define originality as changing the pose, then, is that correct?

A Changing the pose, changing the mechanical function of it.

Q Or changing the mechanical function. You would not define originality as changing the size?

A No.

Q You would not define originality as changing the proportions?

A No.

Q Would you define originality as being analogous to "I am the author, therefore I am the originator"?

A Explain that again.

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2 Q The expression "I am the author, therefore I am
3 the originator," would that be a definition of an originator?

4 A I guess so, yes.

5 Q Would you say that a person who was an author has
6 done original work?

7 A I guess some authors do original work and some
8 don't.

9 MR. FABER: I don't wish to get into any legal
10 argument now. I will get into that at a later point.

11 THE COURT: I think it is perfectly clear, from
12 looking at these two exhibits, that one is an exact replica
13 of the other except for size.

14 MR. FABER: All right.

15 Q I direct your attention now, Mr. Bloch, to Plaintiff's
16 Exhibit 1. I ask you to compare it with Plaintiff's Exhibit
17 2. I believe your testimony was that the only difference,
18 the only area where you can see any difference, was in the
19 hat and the satchel, is that correct?

20 A Um hum.

21 Q Are the heights of the statues different?

22 A Of course.

23 Q I direct your attention to the coats that the
24 Uncle Sam characters are wearing and ask you whether the
25 coats are different.

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2 A The only difference I can see is just a little fold
3 here.

4 Q All right. I direct your attention to the front of
5 the coats, to what might be termed the lapels, and ask you
6 whether they look different in any respect.

7 A The labels?

8 Q The folds of the coat, down near the base of the
9 waistcoat.

10 A I don't quite understand what you mean by -- it
11 looks the same to me.

12 Q It looks the same to you? Does the coat,
13 Plaintiff's Exhibit 2, the plastic bank, look like it is more
14 closed or more open than the coat on Plaintiff's Exhibit 1?

15 A Open.

16 Q It looks more open.

17 A This one looks a little more open (indicating).

18 Q So they are different as to the coat fronts, then,
19 is that correct? I am not trying to put words in yourmouth.
20 I am just asking you.

21 A I know. But it is still the same bloody thing.

22 Q I know. But you haven't answered my question.

23 THE COURT: I think what he is trying to say is
24 that while there may be minute differences, it looks the same
25 to anybody who looks at it.

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THE WITNESS: True. There are minute differences.

Q There are minute differences. I direct your attention to the eagle character on the front of the base of Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 and ask you whether the differences between the two are minute.

A It is an eagle.

Q I know it is an eagle, sir. I am asking you whether the eagles look different in any respect.

A Well, they are facing the same way and they have wings.

Q Do they have facial texture, I mean surface texture, that differs in any respect?

A This is a little sharper than this eagle here, if this is what you are referring to.

Q No. You mean the surface texturing is different, is that correct?

A A little, yes.

Q Is there surface texturing on the metal bank of Plaintiff's Exhibit 1? On the eagle of Plaintiff's Exhibit 1 is there surface texturing, on the eagle of Plaintiff's Exhibit 1?

A Yes.

Q Does he have clearly defined feathers on the body?

A No.

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2 Q I direct your attention to Plaintiff's Exhibit 2
3 and ask whether he has clearly defined feathers on the body
4 of the eagle.

5 A Yes.

6 Q So there is another difference, then, between
7 Plaintiff's Exhibit 1 and 2, is that correct?

8 A If you want to call that a difference.

9 Q Well, you pointed out the hat and satchel but you
10 did not mention the eagle surface texturing, is that correct?

11 A That's true.

12 Q I direct your attention to the claws of the eagle
13 and ask you what the eagle claws in Plaintiff's Exhibit 1,
14 the metal bank, is carrying.

15 A Exhibit 1, did you say?

16 Q The metal bank, Plaintiff's Exhibit 1.

17 A Arrows and laurel leaves.

18 Q I direct your attention to Plaintiff's Exhibit 2,
19 the plastic bank, and ask you what the eagle claws are carry-
20 ing in that bank.

21 A Laurel leaves.

22 Q Are they carrying arrows?

23 A No.

24 Q Are there differences between the banks relating to
25 the arrows and the laurel leaves?

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A Yes.

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Q But you didn't call that to our attention before.

4

A I didn't notice it.

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Q All right. I direct your attention to the cuffs of the pants on Plaintiff's Exhibit 1 and ask you to compare the cuffs on the pants to Plaintiff's Exhibit 2 and tell me whether they are different in any respect.

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A They are shorter.

10

Q They are shorter on Plaintiff's Exhibit 1.

11

A Yes.

12

Q Are they considerable shorter?

13

A They are shorter.

14

Q Are the cuffs on Plaintiff's Exhibit 1 above the ankles or at the ankles?

15

16

A At the ankles.

17

Q I direct your attention to Plaintiff's Exhibit 2 and ask you whether the cuffs in Plaintiff's Exhibit 2 are much lower than those in Plaintiff's Exhibit 1. The answer is yes or no, sir.

18

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20

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A Yes, they are a little lower.

22

Q So there is a difference there, is that correct?

23

A Yes.

24

25

Q I direct your attention to Plaintiff's Exhibit 2, the plastic bank, and ask whether the cuffs of the pants are

1 jgcg Bloch-cross 25

2 not engaged to each other so there is no space between them.

3 A Yes.

4 Q And I direct your attention to --

5 A There is a space.

6 Q There is a space?

7 A There is a space. There is a space here and there

8 isn't a space here.

9 Q There is no space in Plaintiff's Exhibit 2.

10 A Between the legs, down at the cuffs. Are you

11 talking about the cuffs?

12 Q Yes, sir.

13 THE COURT: Is that because of the material used?

14 THE WITNESS: Yes.

15 THE COURT: On account of using plastic?

16 THE WITNESS: I would believe so. This is sturdier

17 than plastic.

18 Q Is it your testimony that it is impossible for the

19 character of Plaintiff's Exhibit 2 to stand unless the leg

20 cuffs are joined?

21 THE COURT: No. He didn't say that.

22 Q I'm just asking you. You said it is purely func-

23 tional. I just want to know whether it is or not. Is it

24 purely functional? Would the character fall or break if the

25 cuffs were not joined in Plaintiff's Exhibit 2?

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2 A No.

3 Q So it could be decorative?

4 THE COURT: It could also be sturdier.

5 MR. FABER: There is no doubt that it is sturdier.
6 But the question is whether it is also decorative.

7 THE COURT: Decorative?

8 MR. FABER: Not decorative in the sense of artistic,
9 in the sense that it is different in a decorative, esthetic
10 way.

11 THE COURT: Does it fold because of the material used?
12 That's why it was put together. I don't think it was put
13 together to make a difference from the bank, No. 1.

14 MR. FABER: We won't get into the motivations at
15 this point. I wish to get into the law in a moment. I think
16 it will show that the test being performed is the wrong test,
17 and that is the whole point.

18 Q I direct your attention to the knees of the char-
19 acter of Plaintiff's Exhibit 1 and ask you to compare them
20 with the knees of the character of Plaintiff's Exhibit 2 and
21 tell me whether the knees are different.

22 A They are bony.

23 Q Which ones are bonier? Plaintiff's Exhibit 1?

24 A Yes.

25 Q So they are different as to the knees.

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2 A Yes.

3 Q Yes?

4 A Yes.

5 Q I direct your attention to the face of the character
6 in Plaintiff's Exhibit 1 and ask you to compare it with the
7 face of the character Plaintiff's Exhibit 2 and ask you
8 whether the width or shape of the two faces differ in any
9 respect.

10 THE COURT: One is bigger than the other.

11 Q Is that the only difference that you see, sir?

12 A Look, it is a copy.

13 Q You haven't answered my question. Your counsel
14 elicited that.

15 A It is almost the same.

16 Q It is almost the same.

17 A It is a little different.

18 Q Isn't Plaintiff's Exhibit 1 a little wider than
19 Plaintiff's Exhibit 2 as far as the face and cheeks are
20 concerned?

21 THE COURT: He means proportionwise.

22 MR. FABER: I mean in appearance, proportionwise
23 as well.

24 A I would have to use -- do you have calipers?

25 THE COURT: It wouldn't do any good. One is a small

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2 size.

3 Q I submit to you, Mr. Block, that the face of
4 Plaintiff's Exhibit 1 is considerably fatter than the face of
5 Plaintiff's Exhibit 2 on a proportion basis and I ask you
6 whether you observed that to be the case.

7 A On Exhibit 2 the face is a little fatter than on
8 Exhibit 1.

9 Q Isn't that the reverse? Isn't Plaintiff's Exhibit
10 1 a little fatter? The metal bank is a little fatter than
11 No. 2.

12 A Again, I can't say it is his face. It is his chin
13 that is a little narrower.

14 Q I direct your attention to the cheeks of the char-
15 acter and ask whether the cheeks of the character are wider
16 on Plaintiff's Exhibit 1 than they are on Plaintiff's Exhibit
17 2.

18 A I couldn't tell any difference.

19 Q All right. I ask you to turn the characters side-
20 ways. Look at them sideways and I ask you to compare the
21 proportionate width of the chest and lower abdomen of
22 Plaintiff's Exhibit 1 with the proportionate width of the
23 chest and lower abdomen of Plaintiff's Exhibit 2 and ask
24 whether there appears to be any difference in these proportions.

25 I don't hear your answer, sir.

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THE COURT: He has to make up his mind.

A This one is leaning a little forward. That is the only thing I can see.

Q You see no difference in the width front to back of the chest, in the proportions of the width front to back?

A In the proportions, no.

Q In the proportions between the chest and the lower abdomen from Plaintiff's Exhibit 1 to that of Plaintiff's Exhibit 2?

A No, I don't.

Q You see no difference. I submit to you, sir, that there is a significant difference --

THE COURT: Don't submit anything. Just ask him questions.

MR. FABER: All right.

Q I direct your attention to the right-hand of the character of Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2. Look particularly at the fingers. I ask you whether there is any difference in appearance between the fingers on Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2.

A Yes. There is more detail in Exhibit 2.

Q Are there are finger delineations in Plaintiff's Exhibit 1?

A Yes. There is more detail.

1 jgcg Bloch-cross 30

2 Q In Plaintiff's Exhibit 2 there are finger delinea-
3 tions?

4 A Yes.

5 Q There is none in Figure 1, is that correct?

6 A Very little.

7 Q I direct your attention to the hair style in
8 Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 and I ask you
9 to make a comparison as to whether the hair styles appear to
10 be the same to you.

11 A I would say it is the same.

12 Q You say it is the same?

13 A Yes. It is long hair.

14 Q Okay. Do you know what the term "mold parting line"
15 means?

16 A Yes.

17 Q What does the term "mold parting line" mean to you?

18 A That is where the two molds part. If it is a two-
19 piece mold, that's where it parts.

20 Q Do you observe a mold parting line in Plaintiff's
21 Exhibit 2?

22 A Yes. A mold parting line, yes.

23 Q A mold parting line in Plaintiff's Exhibit 2.

24 A Yes.

25 Q Would you describe, going down the sleeve and coat,

1 jgcg

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2 where that parting line is located?

3 A Down the entire length of the figure.

4 Q Is it down the middle of the sleeve?

5 A In one place -- yes, approximately in the middle.

6 Q Is it down the middle of the coat?

7 A The middle of the coat?

8 Q The middle of the side of the coat.

9 A The seam.

10 Q It is down the seam of the coat?

11 A Wait a minute. Let me look at this side. Here
12 the seem is scraped off. You don't see a seam.

13 Q Then look at the other side.

14 A You have a seam all the way down.

15 Q All right. And it goes through the middle of the
16 sleeve, is that correct?

17 A It goes through the middle of the sleeve.

18 Q I direct your attention to Plaintiff's Exhibit 1,
19 the metal bank, and ask you to note the location of the mold
20 parting line below the sleeve, at the position below the
21 sleeve on the metal bank. Is there an equivalent of a mold
22 parting line?

23 A That is not a mold parting line.

24 Q Is there a separation line?

25 A There is a separation line.

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2 Q Between the front and the back?

3 A Right.

4 Q And, from your knowledge of molding, was that bank
5 made in two pieces, the metal bank?

6 A Yes.

7 Q And was the front piece made separately from the
8 back?

9 A Yes.

10 Q And is the separation line in the metal bank for-
11 ward of the tail of the coat in the metal bank?

12 A Forward of the tail, yes.

13 Q Yes, it is. Is the mold parting line forward of the
14 tail in the plastic bank?

15 A No.

16 Q Does it go through the tail in the plastic bank?

17 A It goes through the tail.

18 Q Is it not a fact, with respect to the plastic
19 molding, that there is a considerable difference and consider-
20 able importance attributed to the location of the parting
21 line?

22 A Yes.

23 Q And that the choice of location of the parting line
24 is very important when a mold is made?

25 A Yes.

1 jgcg Bloch-cross 33
2 Q And is it not true also that it is important for
3 artistic reasons?

4 A Not necessarily.

5 Q But it could be for artistic reasons?

6 A It could be for artistic reasons, yes.

7 Q Is it also not true that --

8 A There is a straight line. There is nothing artistic
9 in the parting of this. This is a straight part here.

10 Q Yes, sir. Is it not a straight part in the metal
11 bank?

12 A I don't think so.

13 Q Is it substantially straight in the metal bank?

14 A Yes. Up at the head it isn't. But then that's
15 for artistic reasons.

16 Q So it is only at the head that it is not straight.

17 A Only at the head.

18 Q Would it be your testimony that somebody could change
19 a direct copy without going through a number of steps of
20 drawing and sculpting to go from Plaintiff's Exhibit 1 to
21 Plaintiff's Exhibit 2? Would he have to go through steps
22 of drawing and sculpting?

23 A To make this?

24 Q Yes.

25 A Yes.

1 jgcg Bloch-cross 34

2 Q Would the various changes that we've detailed re-
3 result from going through the steps of sculpting and drawing?
4 Would those changes be a result of that?

5 A I would say the changes are because of the parting
6 line.

7 Q The changes are a result of the parting line?

8 A The parting line.

9 Q What changes particularly are a result of the part-
10 ing line?

11 A It is a straight line, and here it isn't. Again,
12 here it is a curved line, for artistic reasons, and here it
13 is a straight line, for a functional reason.

14 Q I see. So the change in the eagle on the front is
15 as a result of the parting line, is that what you are saying?

16 A On the front? No. That has nothing to do with
17 the figure of Uncle Sam.

18 Q You testified that the level of the skill of a
19 maker of Plaintiff's Exhibit 2 would have to be rather low.
20 Is that your testimony?

21 A Well, I wouldn't say low. Mediocre.

22 Q Would he have to be an artist?

23 A Partially, yes.

24 Q Would he have to be a sculpture?

25 A Not necessarily a sculpture.

1 jgcy Bloch-cross 35

2 Q All right. But he would have to be able to sculpt.

3 A He would have to be able to model.

4 Q He would have to be able to make a model?

5 A Make a model.

6 Q You testified that you did not see any novelty in
7 Plaintiff's Exhibit 2. What is your definition of "novelty"?

8 A Novelty? A complete change. This is Uncle Sam
9 with a bag.

2-4 10 Q Is it not a fact -- sorry. You didn't finish.

11 A You would make a complete change in the function of
12 it, using Uncle Sam and the bank.

13 Q So a novelty change requires a complete change.

14 A As far as I'm concerned, yes.

15 Q A change in the hands would not be novelty.

16 A A change in the hands would not be a novelty?

17 Q Is the change in the hands novelty?

18 A Change in the hands would be a novelty.

19 THE COURT: You've testified there is a difference
20 between the hands --

21 THE WITNESS: You mean the fingers.

22 THE COURT: Yes. Is that novelty?

23 Q Is that novelty?

24 A Not as far as I'm concerned.

25 Q Is that new?

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Bloch-cross

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2 A It is just a better reproduction of this hand.

3 Q It is a different reproduction, is it not?

4 A It is the same hand, bent hand with fingers, showing
5 the fingers. Here they don't show the fingers.

6 Q The question to you is, are the fingers different?

7 THE COURT: Yes, the fingers are different, but he
8 doesn't think they are sufficient to call them novelty.

9 MR. FABER: Okay, if that's what his testimony is.

10 Q Is the change in the eagle from Plaintiff's Exhibit
11 1 to Plaintiff's Exhibit 2 novelty?

12 A No. It is just a better job.

13 Q Is the change in the shape of the torso from
14 Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2 novelty?

15 THE COURT: The change in the torso? You mean the
16 minute changes you drew out from him?

17 MR. FABER: The question is whether they are minute.
18 I think you can observe --

19 THE COURT: I observed them. They look the same to
20 me.

21 THE WITNESS: That's what I said before.

22 MR. FABER: We'll go into that in the legal argu-
23 ment. I just wish to say that even if Plaintiff's Exhibits
24 1 and 2 were identical in every respect, according to the
25 Copyright Act that is copyrightable, and you haven't got the

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2 benefit of my papers on the subject at this point and I wish
3 to go into that subject at a later point, after the testimony
4 is done with.

5 THE COURT: I don't know how long you think I am
6 going to stay here. I've been here since 10 o'clock this
7 morning on a criminal trial.

8 MR. FABER: Sorry.

9 THE COURT: You happened to call up yesterday
10 afternoon and said you wanted an evidentiary hearing. That
11 was the first I ever heard of it.

12 MR. FABER: I'm sorry, your Honor. I was told on
13 Friday morning at 11 o'clock that I would have the hearing on
14 Tuesday afternoon. I did not know --

15 THE COURT: I can't adjust my schedule to take care
16 of you.

17 MR. FABER: No, sir, you can't.

18 THE COURT: At 6 o'clock we quit, wherever we are,
19 and come back tomorrow. I am not going to sit here any
20 longer. I'm exhausted. I've had a tough criminal trial all
21 day.

22 MR. FABER: I understand, your Honor.

23 I have no further questions of the witness.

24 THE COURT: All right.

25 Any redirect?

jgcbg Bloch-redirect/Wurmbrand-direct 38

MR. SPARROW: One question.

REDIRECT EXAMINATION

BY MR. SPARROW:

Q Mr. Block, would you characterize any of the differences that counsel pointed out or that you pointed out to counsel as unique or artistic or requiring any degree of originality?

A No.

MR. SPARROW: That's all.

THE COURT: Thank you very much.

MR. BARTH: The government has no questions.

(Witness excused.)

THE COURT: Any further evidence from you?

MR. SPARROW: That's all, your Honor.

MR. FABER: If the Court please, I have a witness of my own.

THE COURT: Put him on.

DANIEL WURMBRAND, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FABER:

Q Mr. Wurmbrand, would you state your age, please.

1 jgcg Wurmbrand-direct 39

2 A 42.

3 Q What is your educational background?

4 A Technical high school and engineering school.

5 Q What engineering school?

6 A NYU.

7 Q What degree did you receive?

8 A A B. S. in mechanical engineering.

9 Q Sorry. I can't hear you.

10 A B. S. in mechanical engineering.

11 Q Have you done any studies in connection with art?

12 A Yes, I did.

13 Q Would you please describe those studies?

14 A I studied drawing in the Art Students League.

15 Q Where is the Art Students League?

16 A It is on 57th Street in New York City.

17 Q What other educational background in art?

18 A I studied sculpture in the New School for Social

19 Research down on 12th Street.

20 Q When did you study sculpture?

21 A Between '62 and '66.

22 Q '62 and '66?

23 A Yes.

24 Q Did you have any other art background or sculpture

25 background?

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Wurmbrand-direct

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2 A I've been in and out of sculpture since I was 12
3 years old. In the last 13 years I've been working on fine
4 arts, sculpture, wood carving.

5 Q Did you ever have any art training out of this
6 country?

7 A Yes.

8 Q Would you tell me your art training out of this
9 country.

10 A I had some private tutoring in art overseas.

11 Q Have you ever had any training in sculpture?

12 A Yes.

13 Q What is your training in sculpture?

14 A In sculpture?

15 Q Yes.

16 A I went to the New School for Social Research.

17 Q That was in sculpture. What is your present
18 employment?

19 A I own a company that does designs, engineering,
20 art work and manufacturing of molds and injection molding.

21 Q What is the name of that company?

22 A Brand Tool Company.

23 Q B-r-a-n-d Tool Company?

24 A Yes.

25 THE COURT: You manufacture molds?

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Wurmbrand-direct

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2 THE WITNESS: Molds, injection molds and injection
3 molding, plastic injection molding.

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4 Q Do you manufacture the type of product that is
5 involved in this lawsuit?

6 A Similar products, yes.

7 Q What duties do you have in connection with that
8 company?

9 A With my company?

10 Q Yes, sir.

11 A I'm the owner of the company.

12 Q What are your duties in connection with that company?

13 A I do management and I do the art design and I do
14 the engineering. I do the layout. I supervise the work,
15 and of course I do the buying and selling.

16 Q What is the art design duties that you have?
17 What does that consist of? What are your art design duties?

18 A Well, once I get the idea from a customer, what
19 he wants to have, I make preliminary sketches. Then we
20 develop them into artistic drawings. Then we build sculpture
21 or models. Then we go into the casting process or the
22 machining process from the model, and from there we proceed
23 into the mechanical and technical details of building molds
24 to the final product.

25 Q Who does the art work for your company?

1 jgcg Wurmbrand-direct 42

2 A Mainly I do.

3 Q Who does the molding for your company, the mold
4 making for your company?

5 A My man.

6 Q And what is your job with respect to mold making?

7 A I devise the work, I supervise it, I machine it and
8 I design the molds, and sometimes I do the art work in the
9 mold itself, when we have to do it right into the steel.

10 Q When did you start your company?

11 A In 1960.

12 Q In 1960?

13 A Yes.

14 Q Have you been doing the work that you've been doing,
15 that you described, since 1960?

16 A Yes.

17 Q Are you doing it today?

18 THE COURT: Let's get down to the exhibits.

19 MR. FABER: If the Court please, I, too, have
20 examples of some of his art work.

21 THE COURT: I don't care about that. I have two
22 exhibits before me. Those are the ones in issue.

23 MR. FABER: Yes, sir. I wish to qualify the man as
24 an expert.

25 THE COURT: You've been doing it for 15 minutes

1 jgcg

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2 now.

3 MR. FABER: Okay.

4 THE COURT: Strike that remark.

5 Q I direct your attention to Plaintiff's Exhibit 1,
6 the metal bank, and ask you if you wish to make a smaller
7 version of Plaintiff's Exhibit 1, a smaller version, any
8 smaller version, what are the steps that you would go through?

9 A Well --

10 Q The metal bank.

11 A I would have to make a drawing, and from there I
12 have to go and sculpt a model, an exact model of whatever it
13 is, reduced in size, and from there we are going to cast,
14 decide on what process we are going to do in order to make a
15 mold, either by pantographing or by casting it.

16 THE COURT: What is pantographing?

17 THE WITNESS: Duplicating.

18 Q Will you describe the pantographing process in more
19 detail, please?

20 A By taking a model and putting it in one place, and
21 on the other side we have a motorized spindle with a metal
22 cutter, and we put another metal, whatever we want to make it
23 from, and by tracing the model we can reduce it in size to the
24 smaller part.

25 Q Is there any other technique besides pantographing

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by which you can make an exact copy?

A Casting it.

Q By casting it.

A Right.

Q Could you make an exact smaller copy by casting?

A You have to make a new sculpture first.

Q So the only way to make an exact smaller copy would be by pantographing, is that correct?

A It will not be exact.

Q And after the pantographing is done, what else has to be done?

A You have to do art work.

Q What type of art work?

A You have to bring out all the details. Whatever comes out in pantographing is very blurred out because it is a machining cutter that does the work. And after that you have to go in by hand and engrave it and sculpt out the details.

Q Is there any way to make a reduced size of Plaintiff's Exhibit 1 without some sculpture operation being involved?

A No.

Q You must sculpt?

A Yes.

Q Must you make a model to go from a larger size to a

1 jgco Wurmbrand-direct 45

2 smaller size?

3 A Yes. It is sculpture work.

4 Q You must do sculpture work.

5 A Right.

6 Q Must the person be a trained sculptor or artist
7 to make a sculpture?

8 A You have to be an artist. A model maker cannot
9 do this type of work. You have to be an artistic model maker.

10 Q I direct your attention to Plaintiff's Exhibit 1,
11 the metal bank, and ask you to compare it with Plaintiff's
12 Exhibit 2, the plastic bank, and ask you in your opinion
13 what were the steps that were followed, going from the metal
14 bank to the plastic bank?

15 A Well, I can guess the steps. But if I were going
16 to make it --

17 Q I ask you what you think the steps were that were
18 performed.

19 A They went ahead and they made a new model, a new
20 sculpture, reduced in size into new proportions.

21 Q You say "into new proportions"?

22 A Right. They changed some of the designs in order
23 to fit plastic. They changed some of the detail work, and
24 from there they proceeded into making the mold.

25 Q Must the persons who made this have made a sculpture

1 jgcg Wurmbrand-direct 46
2 when they reduced from Plaintiff's Exhibit 1 to Plaintiff's
3 Exhibit 2?

4 A The model has to be made by a sculptor. It is
5 not a symmetrical model that you can go by dimension. You
6 have to have the free hand of an art'st in order to carve
7 out the detail, even if it is a copy.

8 Q Is it your testimony that even if it is an exact
9 copy you must have a model maker, is that correct?

10 A Yes.

11 Q Could a layman make an exact copy in smaller size?

12 A No.

13 Q In your opinion, I want your opinion, is Plaintiff's
14 Exhibit 2 an original artistic work compared with Plaintiff's
15 Exhibit 1?

16 A It depends what you call original.

17 Q Of course it does. What is your definition of an
18 original work?

19 A Original -- I would call it an original artistic work,
20 but I wouldn't call it a new design.

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21 Q It is an original artistic work but not a new
22 design.

23 THE COURT: Original artistic simply because it is
24 smaller?

25 THE WITNESS: Because it is smaller and because they

1 jgcb Wurmbrand-direct 47
2 changed a lot of detail in it which you cannot just take by
3 copying it down and reducing it from a large part to a small
4 part.

5 THE COURT: Some of it was done because they were
6 going to use plastic?

7 THE WITNESS: Also because of esthetics. Maybe
8 the artist who made the small one decided that he doesn't
9 like this kind of shape and he changed it.

10 Q I direct your attention to Plaintiff's Exhibit 1.
11 Comparing it with Plaintiff's Exhibit 2, I ask you if you
12 have any opinion as to which, if any, changes were made in
13 Plaintiff's Exhibit 2 for esthetic reasons as opposed to
14 functional reasons. Are there any features that were changed?

15 A It depends on the face. The bag is changed from a
16 wrinkled bag and a concave bag, from a wrinkled design and
17 concave design in the bag into a smoother design and not
18 wrinkled.

19 Q Are there other changes that were made in your
20 opinion for esthetic rather than functional purposes?

21 A Well, there are small details which I looked at
22 before.

23 Q What are you looking at right now?

24 THE COURT: He made a note of what he saw.

25 Go ahead. You can read it.

1 jgcg

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2 Q Just list the details that you think were done for
3 esthetic purposes as opposed to functional.

4 A Well, when I studied the two figures, I found
5 differences in design between the large one and the small
6 one. For example, I'll start from the top.

7 Q Just list them, in the interest of time.

8 A Yes. The ears. On the metal sculpture it has no
9 detail whatsoever. It is just two parts sticking out.
10 On the plastic part they are shaped like an ear.

11 The hair is different. On the metal part it has
12 sideburns. On the plastic part it is surrounded with ears
13 all around -- sorry. It is surrounded with hair all around
14 the ears.

15 Also, the shape and the looks of the hair is dif-
16 ferent. It is very blurred, on the metal part, and smooth
17 versus, on the plastic part, it is all lines, to look like
18 hair.

19 Q Any other features? These are esthetic features,
20 not functional now.

21 A I beg your pardon?

22 Q I want esthetic features that were not changed for
23 functional reasons.

24 A For functional reasons they have changed --

25 Q No. I want esthetic changes, not functional changes.

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2 A The coat is different.

3 Q How is the coat different?

4 A On the metal part the coat is shorter on the width.
5 It is more closed on the plastic part, which is a major de-
6 sign once you make a mold. You can't just go and change it
7 lightly.

8 Q Go on. Any other features?

9 A The end of the pants are closed off on the plastic
10 part. They are on on the metal part.

11 Also they are longer on the plastic part and they
12 are shorter on the metal part.

13 Q Is that for functional or esthetic purposes?

14 A Esthetic.

15 THE COURT: It could be a change in style from when
16 they made the iron one to when they made the plastic one.
17 Maybe they wore them shorter when that was first done.

18 THE WITNESS: That's what I think. Maybe the
19 artist wanted to make it a later style.

20 Q Are there any other esthetic changes?

21 A The face is different too. On the metal part the
22 face has an oval shape versus, on the plastic part, it is a
23 squarer shape and wider.

24 Q How about the torso? Is there any difference in the
25 torsos?

1 jgcy Wurmbrand-direct 50

2 A In what?

3 Q The torso, or body, between the plastic and the metal

4 banks.

5 A On the metal part he has more of a stomach.

6 Q All right.

7 A On the plastic part it is more flat.

8 Q Directing your attention to Plaintiff's Exhibit 2,

9 is there a mold parting line on Plaintiff's Exhibit 2?

10 A Yes. They always have a mold parting line.

11 Q Is there a separation line on Plaintiff's Exhibit 1?

12 A I beg your pardon?

13 Q Is there a separation line on Plaintiff's Exhibit 1

14 between the front and the back?

15 A Yes.

16 Q Would you please describe the significance of the

17 location of the mold parting line on Plaintiff's Exhibit 2?

18 Has it any significance, the location?

19 A Yes. They are different.

20 Q Has that any significance for esthetic reasons

21 between --

22 A They always try to hide the parting line as much as

23 possible, she shouldn't show out to the nakedeye.

24 MR. FABER: I ask that another statue be marked

25 as Defendant's Exhibit A.

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(Defendant's Exhibit A was marked for identifica-

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tion.)

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THE COURT: Any objection?

5

MR. SPARROW: No objection.

6

(Defendant's Exhibit A for identification was

XXX

7

received in evidence.)

8

MR. FABER: I wish to state that this is a copy of

9

the plaintiff's bank, plaintiff's plastic bank here in issue.

10

Is that correct?

11

MR. SPARROW: That's correct.

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12

Q I show you Defendant's Exhibit A and I show you

13

Plaintiff's Exhibit 2 and ask you whether you have made a

14

comparison between Plaintiff's Exhibit 2 and Defendant's

15

Exhibit A.

16

A Yes.

17

Q In your opinion as a plastic molding expert, was

18

Defendant's Exhibit A copied from Plaintiff's Exhibit 2?

19

A Yes.

20

Q And in your opinion, by what technique was this

21

copying done?

22

A I think they used the existing molds that they had,

23

existing cavities, and they copied from it new cavities in

24

order to produce an identical mold.

25

Q Do you mean that they took a sample of --

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MR. SPARROW: Your Honor, with respect to the testimony concerning the plaintiff's bank, I think that it is irrelevant to the issue here.

THE COURT: Sustained. What has that got to do with it? Somebody copied yours?

MR. FABER: I'll explain the purpose of this.

The purpose of this is to show what copying really is as opposed to what copyright ability in different work of art is.

THE COURT: I assume they are both the same size, are they not?

THE WITNESS: The size is close. They are even close on measurement with a caliper.

THE COURT: All right. But that is not the issue.

Q Are they identical in every detail?

A Yes.

THE COURT: Then they are both plastic and one is in metal. There is a fundamental difference because of the material used to make the bank.

MR. FABER: No, sir. There is a fundamental difference in size and all these proportions which go into the manner in which Plaintiff's Exhibit 2 was created. That is what the whole thing is all about, the way it was created.

THE COURT: I understand how it was created. But

1 jgcg Wurmbrand-direct 53

2 let's get down to that issue. I am not interested in
3 Defendant's Exhibit A.

4 All right.

5 MR. FABER: All right. I wish to have it in the
6 record at any rate for the purpose of --

7 THE COURT: What purpose? He has made a motion to
8 strike and I granted it.

9 MR. FABER: All right. I wish to have it included,
10 your Honor. Okay.

11 THE COURT: He has moved to strike it. I granted
12 his motion to strike it.

13 MR. FABER: Okay.

14 Q In your opinion, was there any creation of any sort
15 involved, any artistic creation involved, in going from
16 Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2?

17 A Well, you have to have artistic ability, I would say,
18 to go from Exhibit 1 to Exhibit 2. And the creative part in
19 it is the ability to reduce proportionately from Exhibit 1
20 to Exhibit 2.

21 Q Are the reductions and changes only in proportion,
22 direct proportion?

23 A The proportion and the small details that they
24 changed within the sculpture.

25 MR. FABER: I have no further questions, but I wish

1 jgcg Wurmbrand-direct/cross 54

2 to make some concluding remarks.

3 THE COURT: Go ahead.

4 Cross-examination?

5 MR. SPARROW: Just a few questions, your Honor.

6 CROSS-EXAMINATION

7 BY MR. SPARROW:

8 Q Would you say that Exhibit 1 is an intricate piece
9 of sculpture?

10 A Certainly, yes.

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Q Would you say that in order to make a copy to marry,

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to use the expression, that you would have to make an exact

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reproduction in terms of proportion?

5

A Yes.

6

Q Was that done with Exhibit 2, that is, in connection

7

with Exhibit 2?

8

A Yes.

9

Q With respect to bag -- I think you mentioned the

10

bag is different -- is it easier to mold a smooth bag in

11

Exhibit 2 that is straight or a concave one that is wrinkled?

12

A It doesn't make any difference in the molding.

13

Q It doesn't make a bit of a difference in the molding?

14

A No, sir.

15

Q It is not easier to get the piece out if it is

16

smooth and straight?

17

A No, not in a small part like that.

18

Q Would you say the difference in the way the feeder

19

joined would make Exhibit 2 a stronger structure in plastic

20

than if it were made in the form of Exhibit 1?

21

A It makes it stronger.

22

Q Would you say that there must have been an extremely

23

skilled sculpture to produce Exhibit 2?

24

A Well, he didn't have to be a Michaelangelo, but

25

he definitely had to be a sculpture. You cannot take a

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Wurmbrand-cross

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2 layman and have him carve out things like that.

3 Q Would you say that it took him hours of work in
4 front of the original to produce the copy? What would you
5 estimate as to how long it would take you?

6 A It depends on the artist.

7 Q How long would it take you to do that?

8 A About a day and a half, two days work.

9 Q How would you rate that -- would that be an easier
10 piece than you worked on or a more difficult piece?

11 A I would put it in between medium and difficult.

12 Q Would you say if you were asked to produce a bank
13 with an Uncle Sam figure on a pedestal it would take artistic
14 originality as opposed to the skill necessary to produce it
15 from Exhibit 1?

16 A I didn't understand your question.

17 Q You mentioned that your customers come to you with
18 an idea and that you sketch up and submit different sketches
19 and from that you go on. Is that a more difficult way of
20 producing sculpture designs than if they came to you with
21 Exhibit 1 and said, "Copy it"?

22 A They are going to show me the sculpture and tell
23 me I would like to have it seven inches -- "I would like to
24 have it five inches long; submit to me a drawing of how it
25 is going to look," and from there they are going into sculpture.

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2 Q Would it take the same kind of originality than if
3 they said to you "I have an idea to make a bank with an
4 Uncle Sam figure on a platform"?

5 A It depends on the artist, what he has in mind. If
6 he has it in mind he can do it in two minutes. He could.

7 Q The same artist who can sketch the idea in two
8 minutes or five minutes, how long would it take him to sketch
9 this if he had it in front of him?

10 A Maybe longer.

11 MR. SPARROW: That is all.

12 MR. BARTH: I am an assistant U. S. attorney.

13 The only apparent connection that the government has with this
14 case from the testimony referred to today is that that is not
15 the same thing. However, the Customs Service is in here
16 as a defendant. Under the law customs is required to keep
17 it out of the country. If the copyright falls Mr. Snyder
18 or his company, I'm sure, will withdraw promptly and Customs
19 will have nothing to do with it. I don't see why we are a
20 party to the action. I ask that the action against us be
21 dismissed.

22 THE COURT: I suppose you are a party as to any
23 judgment in case the plaintiff wins. That is the only reason
24 I can see. I will deny your motion. You can leave.

25 MR. BARTH: Your Honor, the aspect of it that the

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government does not appreciate is it being joined here. We are only enforcing the law. If Mr. Snyder has a copyright Customs has to enforce it. If Mr. Snyder doesn't have a copyright, there is no issue here.

THE COURT: You can go home.

MR. FABER: We notified the United States Customs Service. That is what the temporary restraining order required. For the moment, there is no obligation or injunction upon the Customs Service.

MR. BARTH: The government spent two hours on the phone trying to get this cleared up and prefers to be out of the case entirely, if that is acceptable with counsel.

THE COURT: Is it acceptable to counsel?

MR. SPARROW: As I previously indicated to Mr. Barth we have no objection if, depending on the outcome of this hearing -- if the temporary restraining order is turned into a permanent injunction and if Customs will agree to immediately allow our goods entry -- there are goods on the water that are due this weekend. The only reason for joining them was just for the purposes of speed. It took about two months to register the copyrights. We are just worried that it is going to take two months before it is dissolved and meanwhile our goods are on the pier.

MR. BARTH: If Mr. Snyder's copyright is revoked,

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2 then the plaintiff does not need the assistance of the
3 Customs Bureau to enforce an order of this court. I think
4 it is just, as far as the government is concerned here, a
5 waste of time.

6 THE COURT: The motion is denied, but you can leave.

7 MR. BARTH: Thank you.

8 MR. FABER: If the Court please, I wish to give you
9 a brief statement of the law that bears on this case.

10 THE COURT: I have your brief and I will read the
11 law.

12 MR. FABER: We are faced here with a temporary
13 restraining order which, to say the least, is very disruptive
14 to our business. If all of these items are permitted in our
15 monopoly, granted to us under the Copyright Act, is immediately
16 stopped. That is the problem.

17 I wish to give your Honor an outline of originality
18 as required in the Copyright Act. Originality, as it is
19 defined in the case of Alfred Bell and Company versus
20 Cataldo Fine Arts, 191 Fed. 2nd 99 at 102, which is a Second
21 Circuit case, 1951, is the leading case on the definition
22 of originality and the case says, and it is quoted at page
23 14 of my brief that original in reference to a copyrighted
24 work means that the particular work owes its origin to the
25 author. No large measure of novelty is necessary. All that

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2 is needed to satisfy both the constitution and the statute
3 is that the author contributed something more than merely
4 trivial variation, something, it says, which is recognizably
5 his own.

6 Originality in this context means little more than
7 a prohibition of actual copying no matter how poor artistically
8 the author's addition. It is enough if it be his own.

3-2 9 There are numerous cases on what originality is,
10 but, sir, that is originality. In your order in the Misham
11 case, which is the companion case, you said "There is no
12 original idea here."

13 That is the kind of test that one performs under
14 the Patent Act, and there is a section of my brief directed
15 to the question of patents as compared with copyrights.
16 In the Patent Act you must have an original idea. - You must
17 have done something that is new and different, and under the
18 Copyright Act you are rewarded if you have done anything
19 that is artistically different.

20 I think the testimony here today both from
21 plaintiff's expert and from the defendant's expert have shown
22 that the only way that one can go from metal back to that
23 plastic bank is to make a model and it appears also that a
24 sketch has to be made, and the testimony of Jeffrey Snyder
25 included in an affidavit shows that both the sketch in a model

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2 were made. That testimony is in the motion in this case.

3 I submit to you, sir, that that is something more
4 than mere trivial copying and that it is something that the
5 author has contributed that is his own.

6 THE COURT: You mean if I copy exactly by reducing
7 the size which requires me to have a model made by someone
8 to sculp that is something that is added?

9 MR. FABER: Yes, sir, that is exactly what is added.

10 THE COURT: I know your point.

11 MR. FABER: In my --

12 THE COURT: I am making a finding of fact that as
13 far as I'm concerned, it is practically an exact copy and
14 whatever you point to in this differences are so infinitesimal
15 they make no difference. All you have proved here by the
16 testimony today is that if you give a man a seven-inch model
17 and you say I want this to come out in a five-inch model,
18 and he copies it, the fact that he has to have some artistic
19 ability to make a model by reducing the seven to the five
20 adds something to it. That is the only issue in this case.

21 MR. FABER: No, sir.

22 THE COURT: That is the only issue. I have given
23 you my finding of fact.

24 I have listened to you and I have listened to your
25 adversary.

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2 MR. FABER: I haven't completed.

3 THE COURT: As far as I'm concerned you have
4 completed. I can read your brief.

5 MR. SPARROW: I have just a very, very brief
6 statement: If the theory of the defendant was correct then
7 the copyright law really would be a nullity.

8 THE COURT: Address yourself to the case.

9 MR. SPARROW: The Alva case talks about more than
10 a trivial addition, and, of course, it is our position that
11 the differences pointed out between the two banks are merely
12 trivial. They owe their existence simply to a reduction of
13 size and through no artistic originality which we say is
14 required under the copyright law.

15 If it were not, then anything that is copyrighted
16 could be copied if a new model was made and how in the world
17 could you possibly protect and original work if a copy two
18 inches smaller could be made virtually identical to the
19 layman. Sure, you could go and say: Well, there is a wrinkle
20 in the bag and in the copy that is trivial. There is a
21 space between the feet on one and not on the other. That is
22 trivial and utilitarian and we submit that the differences
23 pointed out here and the differences that are visible are
24 mere trivial additions that do not rise to the originality
25 aspect.

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2 THE COURT: This matter is submitted. The tem-
3 porary restraining order is extended for the like period,
4 which is four days. It will be extended for more --

5 MR. FABER: May I be heard factually and on legal
6 points?

7 THE COURT: I have made the determination.

8 MR. FABER: I would like to call your attention to
9 particular cases that bear on this subject.

10 THE COURT: Are they in the brief, in your brief?

11 MR. FABER: Yes, sir, they are.

12 THE COURT: I will read them.

13 MR. FABER: All right, sir.

14 THE COURT: Today is the 6th, so it is extended to
15 May 10. That's the maximum that I can do under the rule.

16 MR. FABER: I would ask your Honor that you stay
17 continuation of the temporary restraining order until such
18 time as you read the papers, because I think they would
19 very strongly --

20 THE COURT: What do you think I am going to do?
21 You heard me say I am going to read the papers.

22 MR. FABER: I ask that you stay the temporary
23 restraining order until that time.

24 THE COURT: I am continuing the TRO until I read
25 the papers, but I can only extend it for four days under the

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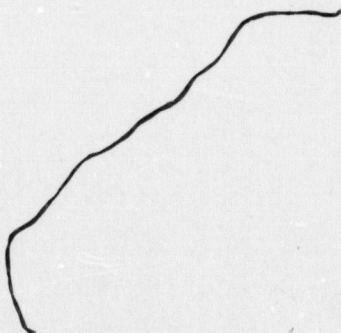
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rules.

All right.

- - - -



WITNESS INDEX

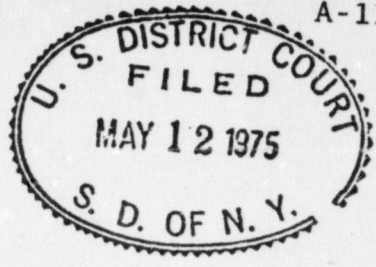
<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
William J. Bloch	3	12	38	
Daniel Wurmbrand	38	54		

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
1	6	8
2	6	8

Defendant

A	51	51
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

L. BATLIN & SON, INC., :
 :
 Plaintiff, : *#42396*
 :
 -against- : 75 Civ. 2036
 :
 JEFFREY SNYDER, d.b.a. JSNY, :
 ETNA PRODUCTS CO., INC. and :
 UNITED STATES CUSTOMS SERVICE, :
 :
 Defendants. :
 :
 ----- X

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Robert C. Faber, Of Counsel

METZNER, D. J.:

Plaintiff in this action moves for a preliminary injunction to compel defendants Jeffrey Snyder, doing business as JSNY, and Etna Products, Inc., to cancel the recordation of Copyright No. CP95891 with defendant United States Customs Service, thereby allowing the entry of plaintiff's product into this country.

At the evidentiary hearing on the motion, the court was shown a cast iron "Uncle Sam Mechanical Bank," admittedly in the public domain, and defendants' plastic version of the bank on which they have a copyright. The latter reproduces the former except that it proportionally reduces the height from approximately eleven inches to approximately nine inches with trivial variations. Plaintiff manufactures outside the United States an identical plastic bank which, it is alleged by defendants, infringes their valid copyright, and which is presently in the process of being shipped into this country in quantity.

In copyright cases, the standard for granting a preliminary injunction is a clear showing of probability of success on the merits. Robert Stigwood Group Ltd. v. Sparber, 457 F.2d 50 (2d Cir. 1972); Concord Fabrics, Inc. v.

Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969); Uneda Doll Co. v. Goldfarb Novelty Co., 373 F.2d 831 (2d Cir. 1967).

I have already held in Etna Products Co., Inc. v. E. Mishan & Sons, 75 Civ. 428 (S.D.N.Y. February 13, 1975), that I find little probability that defendants' copyright will be found valid in a trial on the merits. I reaffirm that opinion here.

The court agrees with the legal proposition advanced by the defendants that to support a valid copyright as a reproduction of a work of art, only originality is required. Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968); Nimmer on Copyrights, § 20.3 (19).

In Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951), in which the court defined originality in a reproduction case, the court stated (at pp. 102-03):

"'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary. . . .

. . . .
All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something

recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own." (Emphasis added.)

There is no question that defendant Snyder is an author within the meaning of the copyright laws. See Irving J. Dorfman Co. v. Borlan Industries, Inc., 309 F. Supp. 21 (S.D.N.Y. 1969).

Defendants contend that the concept of originality embraces a mere copying if it requires artistic skill to achieve the finished product. The court agrees that in this case a degree of physical artistic skill was necessary to produce the plastic article. What defendant overlooks is that this artistic skill must contribute to the work. It must be more than a "merely trivial variation," which is all that is present here. The need for artistic skill in the execution of the copy is not sufficient.

Defendants rely heavily on the "Rodin's Hand of God" case, Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959). In that case the court found a one-half size reproduction of Rodin's famous work to be copyrightable. The court held:

"In a work of sculpture, this reduction requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude." (Id. at 267.)

Even if this court were prepared to accept this decision, the complexity referred to distinguishes that case from the case at bar. Here, no such level of input is reached. Interestingly enough, defendants went to great pains on the hearing to prove that there were substantial differences between the iron and the plastic articles.

The motion by the United States Customs Service to dismiss the complaint is granted.

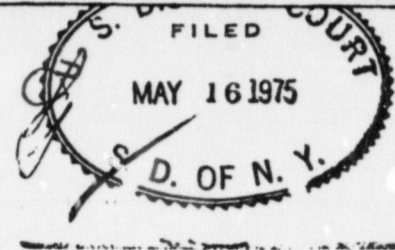
Motion granted.

Settle order.

Dated: New York, N.Y.
May 12, 1975

CHARLES M. METZNER
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
L. BATLIN & SON, INC.,

Plaintiff,

v.

JEFFREY SNYDER, d.b.a. JSNY,
ETNA PRODUCTS CO., INC., and
UNITED STATES CUSTOMS SERVICE,

Defendants.
----- x

Civil Action No.
75 CIV. 2036 CMM

ORDER ON CONSENT AS TO
UNITED STATES CUSTOMS SERVICE.

This cause came on to be heard on plaintiff's motion for a preliminary injunction and the court having considered the complaint, the affidavits submitted in support of said motion and in opposition thereto, and having heard oral evidence in open court, and it appearing to the court after due deliberation that defendants are actually engaged in committing and will continue to commit the acts set forth below, to the irreparable injury of the plaintiff, and the court having made and filed its findings of fact and conclusions of law, it is

ORDERED, that defendants Snyder and Etna Products Co., Inc., their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined, pending the determination of this action, from further asserting, contending, claiming or alleging that Copyright Registration No. Gp 95881 is valid and infringed and from enforcing any alleged rights in and to the said Copyright Registration, and further they are ordered to

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cancel the recordation thereof with the United States Customs Service; it is further

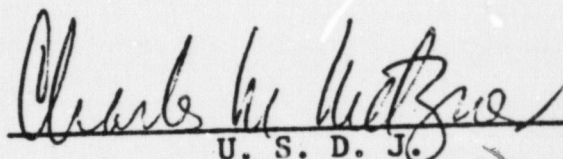
ORDERED, that plaintiff give security in the sum of \$5,000. for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the Court or by the clerk of the court; and it is further

ORDERED, that the motion by the United States Customs Service to Dismiss the Complaint as to it is granted.

Dated: New York, New York

May ~~14~~¹⁵, 1975.

15th


U. S. D. J.

BD

Robert C. Faber
OSTROLENK, FABER, GERB & SOFFEN
Attorneys for Defendants Jeffrey
Snyder and Etna Products Co., Inc.
260 Madison Avenue - 11th floor
New York, New York 10016
(212) 685-8470

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ETNA PRODUCTS CO., INC. and
JEFFREY SNYDER, doing business
under the name and style, J.S.N.Y.,

Plaintiffs,

-against-

E. MISHAN & SONS,

Defendant.
----- x

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
FEB 13 4 21 PM '75

75 Civ.

41883

METZNER, D. J.:

Plaintiffs move pursuant to Rule 65 of the Federal Rules of Civil Procedure to preliminarily enjoin defendant E. Mishan & Sons (Mishan) from alleged infringement of plaintiff Jeffrey Snyder's copyright on a novelty mechanical money bank known as "Old Time Uncle Sam Mechanical Bank." Plaintiffs further seek to enjoin certain acts and practices and to stop certain sales allegedly made in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

The bank was originally designed in the middle of the nineteenth century. It was fashioned of cast

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iron, and when a plunger was pushed a coin placed in Uncle Sam's hand was mechanically deposited into a satchel by his side and thence into a box below. These banks have been frequently reproduced in metal, and when Snyder saw one in 1974 he decided to produce it in plastic for the toy and novelty market. In doing so, he reduced the size of the bank, scaling the height down from eleven inches to nine inches. After having prototypes made, he published the bank (hereinafter the "Snyder Bank"), with copyright notice, on or about October 15, 1974, and received Copyright Registration No. Gp 95881, a class G copyright, on January 23, 1975.

Cursory observation of the Snyder Bank shows that it is extremely similar to the cast iron bank, save in size and material. There are a few other differences, such as the shape of the satchel, and the leaves grasped in the talons of the American Eagle on the base, but these differences are, by all appearances, minor. Plaintiffs argue that the changes made, including the scaling down to smaller size, and the difference in material, all a product of the skill and judgment of Snyder, constitute the sufficient creativity and

originality required for a copyright on a work of art. Defendant, of course, contends that the copyright is invalid, as a mere copy.

Plaintiffs allege that Mishan decided to copy the Snyder Bank. Mishan admits that it took a sample of the Snyder Bank, photographed it for Mishan's sales literature, and used it as a sample at a trade show, having first obliterated plaintiff's copyright notice. Defendant, it must be added, has now arranged to have its own bank manufactured, and is offering same for approximately half the price of the Snyder Bank.

In this circuit the prerequisites for granting a preliminary injunction are either a clear showing of probable success and possible irreparable harm, or, alternatively, a showing of sufficiently serious questions going to the merits, and a decided tip in the balance of hardships in the movant's favor. Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969). In copyright cases, however, the standard is somewhat less, requiring only a showing of reasonable

probability of success on the merits. Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (2d Cir. 1972); Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969); Uneeda Doll Co. v. Goldfarb Novelty Co., 373 F.2d 951, 852 n.1 (2d Cir. 1967).

Copyright Infringement

I think that there is serious doubt as to whether plaintiffs can prevail on their infringement claim. In order for the Snyder Bank to be copyrightable, it must possess the requisite originality and creativity.

"All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.'" Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d Cir. 1951) (citation and footnotes omitted).

It is apparent that the standard required is not high. E.g., Peter Pan Fabrics, Inc. v. Acadia Company, 173 F. Supp. 292 (S.D.N.Y. 1956), aff'd, 274 F.2d 487 (2d Cir. 1960). However, there are

limitations beyond which copyright protection will not be granted. Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968).

The cases are legion stating that the basic requirement is that the author of the work add some input which is recognizably his own, and a mark of his originality and creativity. While this is a question of fact to be determined at trial, the likelihood that plaintiffs here can show any such input is small. First, they argue that the change of material, in itself, is sufficient. This is clearly not so. Plaintiffs rely on Doran v. Sunset House Distributing Corp., 197 F. Supp. 940 (S.D. Cal. 1961), aff'd, 304 F.2d 251 (9th Cir. 1962). In that case, however, the author used a completely new concept. The fact that plastic was used was not controlling. It was that the medium was used to express "the idea of Santa Claus." Id. at 944 (emphasis added). That idea was original, and therefore the copyright was valid. There is no original idea here.

Plaintiffs in their memorandum argue that this is Snyder's idea of Uncle Sam. It is not. This idea is clearly in the public domain, and is the same creative

idea that exists in the antique banks.

Plaintiffs further rely on the change of size of the bank. It should be intuitively obvious that change of size in itself is not copyrightable. If that were true, every copyright of a work of art would be meaningless, as anyone could produce it simply by varying the size. Plaintiffs rely heavily on Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959). In that case, validity of a copyright was upheld for a one-half size replica of Rodin's "Band of God," exact in every detail and aspect, but in a different medium. In upholding the copyright, the court relied on the very special skills of a sculptor which was required to convert such a difficult and unique shape to a different size. There is just no such difficulty involved in producing the Snyder Bank in plastic.

There is no showing of reasonable probability of success on the infringement claim. Thus, the motion for injunctive relief on this issue is denied.

Lanham Act Section 43(a)

Under this section the cases hold that using another's product, or a photograph of that product, to

sell one's own goods, where such goods are less expensive and inferior, is actionable under Section 43(a). Crossbow, Inc. v. Dan-Dee Imports, Inc., 266 F. Supp. 335, 338-40 and n. 1 (S.D.N.Y. 1967); National Dynamics Corp. v. John Surrey, Ltd., 238 F. Supp. 423 (S.D.N.Y. 1963). Defendant admittedly engaged in both of these practices.

Defendant places great reliance on Judge Tenney's view in Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965). In that case, however, the question decided was that there is no common law cause of action for reverse palming off. The reference by Judge Tenney to Section 43(a) was solely to show the necessity of interstate commerce for jurisdictional purposes. See American Optical Co. v. Rayex Corp., 266 F. Supp. 342 (S.D.N.Y. 1966) (Tenney, J.), aff'd, 394 F.2d 155 (2d Cir.), cert. denied, 393 U.S. 835 (1968).

It is clear that the harm to plaintiffs can be irreparable if, during the bicentennial celebration, sales are allowed to continue based on the false advertising of defendant.

The preliminary injunction shall issue on this claim.

Settle order.

Dated: New York, N. Y.
February 13, 1975

Charles W. Metzger
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,

Plaintiff-Appellee,
- against -

JEFFREY SNYDER, etal.,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

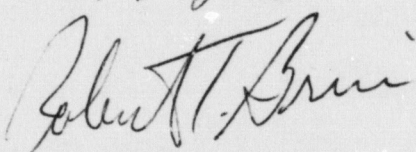
ss.:

I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street New York, New York
That on the 9th day of June 1975 at 521 Fifth Ave, N.Y., N.Y.

deponent served the annexed *Joint Appendix* upon
Jacobs & Jacobs

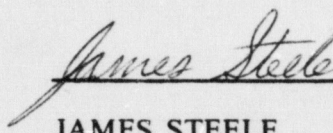
the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 9th
day of June 1975



ROBERT T. BRIN

NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0416350
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 20, 1975



JAMES STEELE